TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. ~~195.~~ 24

FREDERICK WEYERHAEUSER AND JOHN A. HUMBIRD, APPELLANTS,

vs.

HERBERT H. HOYT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JULY 8, 1908.

(21,254.)

(21,254.)

SUPREME COURT OF THE UNITED STATES

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No. 458

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vs.

HERBERT H. HOYT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, A. D. 1907, of said Court, begun and held at the United States Court House in the City of St. Louis, Missouri, on the first Monday in December, to-wit: the second day of December, A. D. 1907, before the Honorable Walter H. Sanborn and the Honorable Elmer B. Adams, Circuit Judges, and the Honorable John F. Philips, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the nineteenth day of June, A. D. 1907, a transcript of record, pursuant to an appeal allowed by the Circuit Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Herbert H. Hoyt was Appellant, and Frederick Weyerhaeuser and John A. Humbird were Appellees, which said transcript of record is in the words and figures following, to-wit:

1 United States Circuit Court, District of Minnesota, Fifth Division.

Herbert H. Hoyt, Complainant,
No. 497. vs. In Equity.
Frederick Weyerhaeuser and John A. Humbird, Defendants.

Appearances:

H. H. Hoyt, Duluth, Minnesota, Solicitor for Complainant.

C. W. Bunn, and J. B. Kerr, St. Paul, Minnesota, and H. Oldenberg, Carlton, Minnesota, Solicitors for Defendants.

Pleas in the United States Circuit Court, District of Minnesota, Fifth Division, in the above entitled cause.

Be It Remembered, That on the 6th day of May, A. D. 1907, there was filed with the Clerk of said Court at his office in Duluth, said District and Division, a stipulation withdrawing certain exhibits from the files and records of said cause and stipulating certain evidence in lieu thereof, and that on the same day Orders of the Court permitting the withdrawal of said exhibits was duly entered in the Term Minutes of said Court, in said cause; which said stipulation and orders are, in words and figures as follows, to-wit:

2 Herbert H. Hoyt, Complainant,
No. 497. vs. In Equity.
John A. Humbird and Frederick Weyerhaeuser.

It is stipulated by and between the respective parties to the above entitled cause, as follows:

1.

That the complainant may withdraw from the record and exhibits the map Exhibit "H" which is identical with the map attached as Exhibit "C" to the bill of complaint therein; leaving in evidence the certificate attached to the map as appears on page 140 of the record.

[2.]

That the complainant may withdraw from the record the map marked Exhibit "I" leaving in evidence the certificate attached to the map as appears on page 141 of the record, and substitute therefor a lithographic copy.

3.

That the complainant may withdraw from the record and exhibits, Exhibits "S" and "V" except to the extent that those Exhibits are copied into the record on pages 151, 152, 153 and 154.

4.

That defendant's Exhibit "I" may be withdrawn, and that the following shall be taken as a correct statement of the facts shown by that Exhibit in so far as it affects this cause:

3 That Exhibit "I" is a copy of Northern Pacific Railroad Company's selection list No. 15, filed at Duluth, Minnesota, October 17, 1883. That in said list there was selected 43,548.12 acres of land, including the S. W. 1/4 of S. E. 1/4, of Section 7, township 54 north, range 14 west, the land here in suit. This list specifies losses in bulk, i. e. it stated the losses by specific descriptions, and the selections by specific descriptions, each footing up the same number of acres; but it did not assign each selection to a particular loss.

This selection list was accepted by the Register and Receiver and transmitted to the general land office. That attached to this list were two certificates, one of which is copied into the record at page 149, and the other of which is as follows:

United States Land Office,

Duluth, Minn., Oct. 17, 1883.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Northern Pacific Railroad Company, under the grant to the said Company by Act of Congress approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad Company by Chas B. Lamborn, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States and within the limit of 40 miles on each side and that the same are not, nor is any part thereof, returned and denominated as mineral land or lands, nor claimed as swamp lands; nor is there any homestead, pre-emption, state or any other valid claim to any portion of said lands on file or record in this office.

We further certify that the foregoing list shows an assess-

ment of the fees payable to us, allowed by the Act of Congress, approved July 1, 1864, and contemplated by the circular of instructions dated January 24, 1867, addressed by the Commissioner of the General Land Office to Registers and Receivers of the United States Land Offices; and that the said Company have paid to the undersigned, the Receiver, the full sum of Five Hundred & Forty-four (544) Dollars in full payment and discharge and said fees.

(Sgd.) J. R. CAREY, Register.
W. W. SPALDING, Receiver.

5.

That defendant's Exhibit "2" may be withdrawn, and that the following shall be taken as a correct statement of the facts shown by that exhibit, in so far as it affects this cause.

That Exhibit "2" is a rearrangement of List No. 15, referred to in paragraph 4 hereof. This rearrangement was made by the Railroad Company pursuant to an order by the Secretary of the Interior, and the rearranged list was filed in the Duluth Land Office on April 11, 1893. The reason for the rearrangement was to specify a particular tract lost as a basis for each selection. In this rearranged list there was set opposite the tract in controversy the N. W. 1/4 of N. E. 1/4 of section 11, township 46 North, range 16 west in Minnesota. That attached to this list was a certificate which is copied into the record at page 150.

6.

That defendant's Exhibits "3" and "4" may be withdrawn, and that the following shall be taken as a correct statement of the facts shown by those exhibits:

That Exhibit "3" shows that the line of the Northern Pacific Railroad from the Red River of the North to Thomson, Minnesota was definitely located November 21, 1871.

That Exhibit "4" shows that the line of the Northern Pacific railroad from Thomson, Minnesota, to a point near Ashland, Wisconsin, was definitely located July 6, 1882.

7.

That defendant's Exhibits "5" and "6" may be withdrawn, and that the following shall be taken to be a correct statement of the facts shown in those exhibits in so far as they affect this cause.

That the Lake Superior & Mississippi railroad, as definitely located and constructed, extended from St. Paul in a northerly

direction to Duluth, Minnesota; and that the Northern Pacific railroad, as definitely located and constructed, extended from Ashland, Wisconsin, westerly across Wisconsin and Minnesota.

8.

That defendant's Exhibit "16" may be withdrawn. It being the same as appears in the printed regulation of the Secretary in the 28th volume of the land office decisions commencing on page 103 of that volume, the copy of said circular there appearing may be considered in evidence in this case.

H. H. HOYT,
Solicitor for Complainant.

C. W. BUNN,
Solicitor for Defendants.

In accordance with the foregoing stipulation, it is, by the Court

Ordered: That complainant herein be and hereby is granted permission to withdraw the following papers from the records and files of said cause, to-wit: Complainant's Exhibits "H", "S" and "V"; and the Clerk of this Court is hereby directed to deliver said Exhibits to the solicitor for the complainant herein upon the delivery to him of a receipt therefor.

And it is by the Court further

Ordered: That complainant may withdraw from the record and files in said cause the map marked Exhibit "I" upon the substitution therefor of a lithographic copy thereof, and upon the delivery to the Clerk of the Court of a receipt for said Exhibit "I".

And it is by the Court further

Ordered: That the defendants herein be and they hereby are granted permission to withdraw the following papers from the records and files in said cause, to-wit: defendants' Exhibits Nos. 1, 2, 3, 4, 5, 6 and 16; and the Clerk of this Court is hereby directed to deliver said Exhibits to the solicitors for the defendants herein upon the delivery to him of a receipt therefor.

That thereafter, to-wit: on the 8th day of November, A. D. 1905, there was filed with said clerk a transcript from the District Court of the Eleventh Judicial District, State of Minnesota, County of St. Louis, in said cause; in the words and figures following, to-wit:

7 District Court, Eleventh Judicial District.

State of Minnesota,
County of St. Louis—ss.

Herbert H. Hoyt, Plaintiff,
vs.
Frederick Weyerhauser and John A. Humbird, Defendants.

Complaint.

The plaintiff for his cause against the defendants alleges:

I.

That at all of the times in this complaint mentioned, the land hereinafter described was, and now is, unfit for cultivation, and valuable chiefly for the timber standing and growing thereon, and has no valuable deposit of gold, silver, cinnabar, copper or coal, and that the land is now in a state of nature, uninhabited, and contains no mining or other improvements.

8 II.

That on or about December 17, 1898, one Richard B. Jones who was then and there a citizen of the United States, over the age of twenty-one years, and in all respects duly qualified to enter land, desiring to avail himself of the provisions of the act of Congress entitled "An Act for the Sale of Timber Land in the States of California, Oregon and Nevada, and in Washington Territory," approved June 3, 1878, as amended by act of August 4, 1892, extending the benefits of the former act to all the public land states, did file with the Register and Receiver of the United States land office of the Duluth Land District, at Duluth in the State of Minnesota, a written statement in duplicate wherein he designated by legal subdivision the particular tract of land he desired to purchase, that is to say, the South West $\frac{1}{4}$ of the South East $\frac{1}{4}$ of Section Seven (7) in Township Fifty four (54) North of Range Fourteen (14) West of the 4th Principal Meridian in the district of lands subject to sale at Duluth, Minnesota; which written statement set forth that said land was then unfit for cultivation, and was valuable chiefly for its timber; that it was uninhabited and had no mining or other improvements, or any valuable deposit of gold, silver, cinnabar, copper or coal. Said written statement further set forth that said Jones had made no other application under said act of Congress, and that he did not apply to purchase said land on speculation, but in good faith, to appropriate it to his own exclusive use and benefit, and that he had not directly or indirectly, made any

9 agreement or contract in any way or manner, with any person or persons whomsoever, by which the title

which he might acquire from the Government of the United States should inure to the benefit of any person except himself. Said statement in duplicate was then and there signed by said Jones, and was verified by his oath before the register of said United States land office of the Duluth Land District (in which district the land was situated and one of said duplicate statements, signed and verified by said applicant as aforesaid, was by the receiver of said land office transmitted forthwith to the general land office at Washington, D. C.

Upon the filing of said statement, the said register of said land office did forthwith post in his office, for the period of sixty days, a notice of said application, embracing a description of said land by legal subdivision, and did furnish to said applicant a copy of said notice, which was thereupon published at the expense of said applicant for a like period of sixty days, in a newspaper printed and published in Duluth, Minnesota, which newspaper was then and there the newspaper published nearest to the location of said land. That on the 27th day of March, 1898, and after said copy of said statement had been posted for the full period of sixty days, and had likewise been published as aforesaid for the full period of sixty days, no claim adverse to said claim of said applicant had been filed in said land office; and the said applicant did then and there furnish to the said register of said land office satisfactory evidence (which evidence was satisfactory to the said register) that said notice of said application prepared by the register had been duly published for the period of sixty days in the newspaper published nearest to the location of said land, and further establishing that the said land was valuable chiefly for timber, and was unfit for cultivation and was not included within any military, Indian or other reservations of the United States, and had not been offered at public sale according to law prior to June 3, 1878, and that it was subject to entry under said act of Congress, and was uninhabited and without improvement, and that it contained no valuable deposits of gold, silver, cinnabar, copper or coal, and that all the averments in said written statement contained were true. A copy of all the papers containing evidence above mentioned and above referred to is hereunto attached marked Exhibit "A", and made a part of this complaint.

And thereupon the said Richard B. Jones did pay to the receiver of said land office of the Duluth Land District the purchase money of said land, to-wit, the sum of two and one-half dollars per acre, in lawful money of the United States, together with all fees of the register and receiver as required by law; and thereupon the said applicant was by said register and re-

ceiver permitted to enter, and he did enter, the said tract of land hereinbefore described, and the said receiver did execute, and deliver to him a certificate of purchase of said
11 land substantially in the words and figures following, to-wit:

No. 14812.

Receiver's Office at Duluth, Minn., December 10, 1895.

Received from Richard B. Jones of St. Louis County, Minnesota, the sum of One Hundred Dollars, being in full for the $SW\frac{1}{4}$ of $SE\frac{1}{4}$ of Section No. 7, in Township No. 54 N. of Range No. 14 W. 4th P. M. containing forty acres, at $2.50 per acre.

J. M. SMITH, Receiver.

$100.00.

$0.65 cents testimony fee received. Number of written words 433, rate per hundred words 15 cents. Paid March 22, 1898.

On margin of receipt the following, $10.00 for T. & S. No. 3377, December 17, 1897. Across the face of the receipt in red ink appears the following: "This receipt is issued under the order of the Secretary of the Interior, dated February 28, 1898, subject to any claim the Northern Pacific Railroad Company may have to the lands herein described."

That said J. M. Smith was at the date of the certificate above mentioned the duly appointed, commissioned and
12 qualified receiver of said land office of the Duluth Land District. That thereafter, and on or about the 10th day of December, 1898, said register and receiver did transmit to the general land office at Washington all of the testimony and papers in the matter of said application by said Richard B. Jones, including the duplicate of said certificate of purchase, and said papers and testimony were received and placed on file in the general land office, in the month of December, 1898. That thereafter and on the 19th day of December, 1898, Richard B. Jones and wife sold and conveyed the said land to one Minnie Stewart by deed, duly signed and acknowledged by said Jones and wife, which deed was duly recorded in the office of the Register of Deeds of St. Louis County, Minnesota, the county in which said land is situated, on the 3rd day of October, 1902, in Book 195 of Deeds on page 453, to which the plaintiff prays leave to refer. That thereafter and on the 22nd day of March, 1902, the said Minnie Stewart and her husband did convey said land by deed to Herbert H. Hoyt, the above named plaintiff, which deed was duly signed and ac-

knowledged by said Minnie Stewart and her husband, and was recorded in the office of the Register of Deeds of St. Louis county, Minnesota, the county in which the land is situated, on the 3rd day of October, 1902, in Book 195 of Deeds on page 454, to which the plaintiff begs leave to refer.

That on the 2nd day of December, 1901, the Commissioner of the General Land Office did make and render his de-
13 cision holding for cancellation the entry of the land heretofore referred to by Richard B. Jones, declaring said entry to be null and void, upon the pretended ground stated in such decision, of which the following is a copy:

Washington, D. C., Dec. 2, 1901.

"Register & Receiver,
"Duluth, Minn.

"Sirs,—

"The SW¼ of SE¼, Sec. 7, T. 54 N., R. 14 W. was selected by the Northern Pacific Railroad (now Railway Co.), October 17, 1883, for second indemnity, per list 15, re-arranged list 15 B., in lieu of land in Sec. 11, T. 46 R. 16 W. in the primary limits disposed of between date of grant and definite location of the road, which selection has not since been abandoned or the basis otherwise used.

"The selection was cancelled, however, by letter of March 22, 1897, because the land is east of Duluth, the then eastern terminal of the grant under departmental ruling; but said cancellation was rescinded and the selection restored by letter of May 26, 1900, under the decision of the U. S. Supreme Court, 177 U. S., 435, that the grant extends to Ashland, Wisconsin.

"December 17, 1897, Richard B. Jones applied to purchase said tract under the Timber & Stone law, and after due publication and proof, made entry thereof December 10, 1898. Cash certificate No. 14812.

14 "Under the decision of the Court, the selection of the company is a valid selection, and the claim of Jones not having been perfected prior to January 1, 1898, his claim is not within the act of July 1, 1898 (Departmental decision of May 22, 1900, Salter v. Company.

"Said entry is therefore hereby held for cancellation for conflict with the prior valid selection of the company, subject to appeal. Notify him hereof; the company will be informed by this office.

Very respectfully,

W. S. RICHARDS,
Assistant Commissioner."

That said order was so made and entered by the Commissioner of the General Land Office without any previous notice to Richard B. Jones, or to those claiming title to the land under him, and without any trial or hearing, and without any legal or competent evidence.

That at the time of the tender of the application by Richard B. Jones, the land was a part of the public domain, subject to appropriation; that said entry by Jones has never been waived, canceled or relinquished to the United States in any manner by the plaintiff or by any of his predecessors in interest, and that said order of the Commissioner of the general land
15 office purporting to hold for cancellation said entry, was without jurisdiction, and was, and is, void.

And the plaintiff further shows that under the rules and practice of the Department, an appeal from the decision of the Commissioner of the General Land Office was duly taken to the Secretary of the Interior, and after due consideration of the subject matter, the decision of the Commissioner was, on August 30, 1905, affirmed. A copy of such decision is hereto annexed and made a part of the plaintiff's complaint and marked Exhibit "B".

That, notwithstanding the said entry and payment by said Richard B. Jones, a patent for said land, in the name of the United States, signed by the president and countersigned by the recorder of the General Land Office, was thereafter issued to the Northern Pacific Railway Company, from the General Land Office at Washington.

That the Northern Pacific Railway Company, long before the issuing of said patent, had full knowledge and notice of said entry and payment therefor by said Jones, and of the plaintiff's rights and claims thereunder; and that such pretended cancellation of said Jones' entry was ineffectual and void.

III.

And the plaintiff further says, that the land in controversy in this suit, and heretofore described, was not within the original grant to the Northern Pacific Railroad Company conferred upon that road by the act of Congress dated
16 July 2, 1864, but was embraced within the extended indemnity limits of said road by the Joint-resolution of Congress dated May 31, 1870. That the pretended selection of said land for indemnity for the loss of land within the place limits of the grant to the Northern Pacific Railroad, was illegal.

The basis of this selection being the alleged loss of the N½ of NE¼, Sec. 11, T. 46 N. R. 16 W., within the overlap-

ping limits of the grant to the State of Minnesota, to aid in the construction of a railroad from St. Paul to Lake Superior, of which the Lake Superior & Mississippi R. R. Co. became the beneficiary. The date of that grant being May 5, 1864, was prior to the date of the grant to the Northern Pacific Railroad Company, and the land for which indemnity in this case is claimed was approved to the Lake Superior & Mississippi R. R. Co. April 25, 1868. The base land was outside of the withdrawal of May 26, 1864, for the benefit of the Lake Superior & Mississippi Railroad Company, and beyond the lateral limits of the grant to said Lake Superior & Mississippi Railroad Company, under the act of May 5, 1864, but was within the limits of the extension of the grant to said company under the act of July 13, 1866. If the base land had been within the grant to the L. S. & M. R. R. Co. under the act of May 5, 1864, then the right of the Northern Pacific Railroad Company (if any existed), would be to seek indemnity for its loss within the first indemnity of its road. If the loss occurred after the date of the grant to the Northern Pacific Railroad Company, and such loss was occasioned
17 by reason of the selection of said land by the L. S. & M. R. R. Co., then no indemnity would be allowed for such loss, for the reason that, if the Northern Pacific Railroad Company was entitled to the land, and the L. S. & M. R. R. Co. was allowed to select the same, the rights of the Northern Pacific Railroad Company to this land should be sought against the Lake Superior & Mississippi Railroad Company, and not against the United States. There is no provision of law permitting indemnity for the loss in such cases. Upon the facts stated, the plaintiff claims that the selection of this land as indemnity for the lands alleged to have been lost, was illegal and void.

IV.

And the plaintiff further says, that under the 3rd section of the act of July 2, 1864, granting land in aid of the construction of a railroad from Lake Superior to Puget Sound, it was provided:

"That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

Between Duluth and Thompson's Junction, the route of the Northern Pacific Railroad is upon the line of the Lake Sup-

perior & Mississippi Railroad, and between these
18 points the amount of land granted in aid of the construction of the Lake Superior & Mississippi R. R. should be deducted from the amount of land granted to the Northern Pacific Railroad Company.

And the plaintiff further shows, that in order to make plain the line of the two grants, a copy of the official diagram of each road is herewith attached marked Exhibit "C", and made a part of this complaint.

V.

And the plaintiff further shows, that in order to make a valid selection of lands in lieu of lands lost within the primary limits of the Northern Pacific Railroad Company's grant, certain things are required to be done: The list of selections must be made in accordance with the law and the rules of the Department. If the list is not made in the manner prescribed, then the preliminary proceedings are of no more effect than would be the filing of any other unauthorized paper in the local land office. The plaintiff claims that, because of the willful disregard of the law and rules of the Department by the Northern Pacific Railroad Company, list No. 15 and List No. 15 B. are not effective to segregate the land selected, and are absolutely void for any purpose. Under the Joint-resolution of May 31, 1870, the Northern Pacific Railroad Company could receive no land within the second indemnity limits of its road until it was to appear that the quantity of lands in the first indemnity limits were
19 insufficient to make up the deficiency. The selecting agent applying to make indemnity selections, is required to state in his affidavit attached to the list presented, that the specific lands for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner; it must also appear that lands selected within the second indemnity limits of said railroad were based upon losses in the place limits of the grant, subsequent to the date of the grant and prior to the definite location of the road, and where deficiencies exist, for which indemnity is allowed by law, the lieu selections must be made from vacant, unappropriated lands, within proper sections and limits nearest the granted sections in which the loss occurred. None of these things which are required to be done, were done by the company in selecting this land in controversy; and the burden of showing these facts was upon the railroad company.

The list when filed in the land office, should have all things that are required by law and the rules of the depart-

ment, accompany the selection in order to make a valid list. Between the Government and the railroad company, if so disposed (no other rights intervening), the want of these requirements might be waived, but the plaintiff denies the right of the Secretary, when the list is before him and the rights of private individuals may be affected, to waive any of these requirements for the benefit of a railroad company.

20 VI.

And the plaintiff further says, that by the 3rd section of the granting act the Northern Pacific Railroad Company was to receive:

"Every alternate section of public land (not mineral), designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through a state."

Congress did not intend to grant to the Northern Pacific Railroad Company twenty alternate sections of land per mile, when the road passed through a state; but the intention was to grant ten alternate sections per mile on each side of said railroad line. The plaintiff avers, and charges the fact to be, that said company had exceeded the amount of land granted to it on the side of the road that the land in controversy is situated, long before the patent for this land was issued to the Northern Pacific Railroad Company.

VII.

The plaintiff further says, that by the act of Congress of July 2, 1864, the Northern Pacific Railroad Company was authorized and empowered to lay out, locate, contract, and furnish, maintain and enjoy a continuous railroad and telegraph line, with the appertenances, beginning at a point on Lake

21 Superior, in the State of Minnesota or Wisconsin, thence westerly to some point on Puget Sound. The question came before the Secretary of the Interior for his decision as to what point on Lake Superior the eastern terminus of said railroad should be fixed, and by a decision of the Department of November 13, 1895, it was declared that the eastern terminus of said road was not farther east than Superior; subsequently, and on the 27th day of August, 1896, the Secretary of the Interior rendered a decision wherein he held that the eastern terminus, or the initial point on Lake Superior of the Northern Pacific Railroad grant, by act of July 2, 1864, to be at Duluth, in accordance with which, on December 24, 1896, the land office prepared a diagram showing the east-

ern terminus of said grant; a copy of which was transmitted to the Duluth Land Office on January 22, 1897.

On July 17, 1897, the Commissioner of the General Land Office addressed a communication to the Register and Receiver of the Duluth land office, of which the following is a copy:

"Department of the Interior,

"General Land Office,

Washington, D. C., July 17, 1897.

"Register & Receiver,

"Duluth, Minn.

Sirs:

"On August 27, 1896 (23 L. D., 204), the Secretary of the Interior rendered a decision wherein he held
22 that the initial point on Lake Superior or the eastern terminus of the grant to the Northern Pacific Railroad Company, was at Duluth, Minnesota, and on December 24, 1896, he approved a diagram prepared by this office showing the eastern terminus of the grant.

"On January 22, 1897, a copy of so much of said diagram as related to, affected lands within your district was transmitted to you for the use and guidance of your office.

"The decision of the Secretary aforesaid, had the effect of restoring to the public domain all lands lying east of said terminal, which had theretofore been withdrawn on account of the grant to said railroad company. Therefore, to the end that all persons interested may have opportunity to present any claim they may have to any of these lands, you will cause to be published for the period of thirty days, in some newspaper of general circulation in their vicinity, a notice referring to said Secretary's decision, which in effect declared that all lands previously withdrawn on account of the grant to the Northern Pacific Railroad Company, and lying east of the terminal established at Duluth, are restored to the public domain, and are subject to disposal at your office. It should be specifically stated in said notice that all persons claiming rights under the provisions of the act of March 3, 1887 (24 Stat. 556), through purchase from the railroad company should come forward and assert their claims at the earli-
est possible date, in order to avoid conflicts which
23 will necessarily arise through entries made under the general laws, your office having no information as to the tracts likely to be claimed under said act."

And the plaintiff further says, that the notice required to be given by the local officers, referred to in the above communication to them from the Commissioner of the General Land Office, was given. No claim of any kind was presented to the local office either by the Northern Pacific Railroad Company, or any other person or persons. On December 17, 1897, Richard B. Jones tendered his application for this land. Proofs were subsequently taken after public notice given, as the law directs, that such proofs would on a certain day be offered and that all persons adversely interested should present their claims to the same. No protest of any kind, by any company or individual, was offered against the right, either of the Government to dispose of this land or the applicant to acquire title thereto. These lands were restored to the public domain by direction of the Secretary and remained public lands up to July 12, 1900, when the Commissioner reinstated the selection list by an order of that date directed to the Register and Receiver, in which appears the following:

"The cancellation, therefore, of the company's selections above referred to, was erroneous, and is hereby resinded and the selections restored to the records, which fact you will please note on your records. The selections will now
24 be duly considered upon their legality otherwise, and in connection with any conflicting claims."

The plaintiff further says, that the reinstatement of the former selections could in no way affect the title of Jones to this land whether the original cancellation of the selection list was the result of an error of the Land Department either in law or in fact; the land remained, until the selection was approved by the Secretary, public land at the disposal of the Government; and if, when the application for this land, now under consideration, was made, or at the date of the completion of the final entry by payment, it was public land, it must have been free and clear from any prior claims—the purchaser by such payment obtained complete title thereto, good against all the world.

The plaintiff further says that on the 28th day of February 1898 (26 L. D., 265), an order was made with reference to the lands within the grant of the Northern Pacific Railroad Company, lying east of the terminal as established at Duluth, in which the following appears:

"As a matter of proper administration, and of due regard to the settlers and others attempting to acquire these lands, and as a matter of due regard to the possible rights of the

railroad company, it is directed that the odd-numbered sections available to the company's grant, within the primary limits, and those selected within the indemnity limits formerly recognized, to the east of the terminus established
25 by the departmental ruling in question, be suspended from entry pending the judicial determination of the courts of the question in controversy. While entry of these lands will not be allowed during this suspension, yet in all cases where entries have been heretofore allowed, the parties will be permitted to complete the same by making proof thereon, but the issue of patent will be suspended until such judicial determination."

The plaintiff further shows, that on April 4, 1898 (26 L. D., 188), the department issued instructions in explanation of its order of February 28, 1898, above referred to, based upon an inquiry from the register of the Duluth land office asking—

"Will the office, after taking proof in homestead entry, timber and stone entry, heretofore allowed, accept payment, issue final receipts and final certificates? Referring to suspended Northern Pacific land east of Duluth."

To which the Department replied,

"The question raised oy the telegram from the register at Duluth is as to his authority, upon the making of final proof upon entries heretofore allowed, to accept payment and issue final receipts and certificates upon such entries.

"It is not the intention of this Department to require of these entrymen that they make payment at the time
26 of their proof, due to the pendency in the courts of the question as to the legality of the company's claim to these lands, but where the money is tendered, the usual final receipt and certificate will be issued, if the proof is otherwise regular and satisfactory; but upon the final certificate issued by the register, and the duplicate final receipt given to the entryman, will be noted in red ink, across the face of each, the following—

" 'This receipt (or certificate) is issued under the order of the Secretary of the Interior dated February 28, 1898, subject to any claim the Northern Pacific Railroad Company may have to the land herein described.' "

The plaintiff further says, that the Secretary of the Interior was not authorized to add to the receipt or certificate what said instructions directed should be written in red ink, across the face of said paper.

VIII.

The plaintiff further says, that under the provisions of the act of Congress of July 1, 1898, he is fully protected in his claim of title to the land in controversy. The construction of the act, as shown in Exhibit "B" attached to this complaint, by the decision of the Secretary, destroys the title of the complainant to this land. It is for the purpose of obtaining a judicial construction of this act that this action is brought. In applying the provisions of the act to the claim presented, the only contention in this controversy is as to the construction that should be given to claims arising under the timber
27 and stone law, where the application is tendered prior to January 1, 1898, to enter a tract of land, but the entry is not completed by payment until subsequent to that date.

The Department's construction of the act is that a claimant to be entitled to its provisions must either be a settler on the tract, or a purchaser of the land prior to January 1, 1898. The plaintiff contends that the act of July 1, 1898, was intended to have a wider scope.

The act in specific terms embraces all qualified persons, who had, prior to January 1, 1898, initiated a claim to the land in good faith under color of title, or claim of right, under any law of the United States, or any ruling of the Department; whether the claimant be a settler, or an entryman, or a purchaser, or whether he had completed his entry by payment prior to January 1, 1898, or whether his claim rests on a simple application made prior to January 1, 1898.

The plaintiff further shows, that subsequent to the date of the act, and on February 11, 1899, the Department issued a circular regulating the adjustment under the act (28 L. D., 103). In paragraph 1, Subdivision "A", under the head of "Who Are the Beneficiaries Under the Act", appears the following:

"Par. 1. The act designates a class of beneficiaries whose status is that of claimants adverse to the Northern Pacific Railroad Company, or its successor in interest, and in doing so, different words and terms of description are used
28 in different portions of the act, but considering the act in its entirety and giving due recognition to each provision therein, this class embraces any qualified person who prior to January 1, 1898, by settlement, initiated, in good faith, a claim to lands of the description given, under color of title or claim of right, under any law of the United States, or any

ruling of the Interior Department, and who is still maintaining such claim conformably to such law or ruling."

Subdivision "C" designates what claim to this class of lands comes within the provisions of the act.

"Par. 8. An individual claim adverse to the railroad claim is one which, prior to January 1, 1898, was initiated in good faith by some qualified person, by settlement, entry, or purchase, 'under color of title, or claim of right, under any law of the United States, or any ruling of the Interior Department', and which is still maintained conformably to such law or ruling, and is one which, in the absence of the railroad claim, could be perfected into full title."

The plaintiff further says, that by the circular of the Department dated February 11, 1899 (28 L. D. 105), Par. 2, referring to who is the lawful successor of the Northern Pacific Railroad, the department finds, upon examination of a certified copy of the records in the foreclosure of a mortgage given by the Northern Pacific Railroad Company, that the Northern Pacific Railway Company is the lawful
29 successor in interest as to all lands within the limits of the grant, excepting those situated within the State of Minnesota, and in the State of North Dakota, east of the Missouri River. As to all lands within these limits, the Northern Pacific Railroad Company had no successor.

On November 21, 1899 (29 L. D., 316), the departmental regulations of February 11, 1899, were so modified as to recognize the Northern Pacific Railway Company as the lawful successor in interest as to all lands within the limits of the grant to the Northern Pacific Railroad Company. This conclusion of the Department was based on the following:

"There have been filed in this department examined copies of special master and receiver's deed, dated September 22, 1899, conveying to the Northern Pacific Railway Company all the rights of the Northern Pacific Railroad Company in and to the lands east of the Missouri River, whether under the grant expressed in the Act of Congress of July 2, 1864, or under any subsequent grant, by way of indemnity or otherwise, subject, however, to a certain mortgage, or trust deed dated the first day of January, 1881, and known as the general first mortgage of said Northern Pacific Railroad Company, and executed by it to the Central Trust Company of New York, as trustees; also a certificate of satisfaction of said general first mortgage, said certificate having been duly executed by the

Central Trust Company of New York on the 13th inst. In view of the showing above referred to, the circular
30 of February 14, last, will be modified so as to recognize the Northern Pacific Railway Company as the lawful successor in interest as to all the lands within the limits of the grant provided for in the acts making grants to the Northern Pacific Railroad Company."

The plaintiff further shows, that Congress has never recognized the Northern Pacific Railway Company as in any way the successor of the Northern Pacific Railroad Company, but by the act of July 1, 1898, declared that—

"The legal question, whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act."

The plaintiff further says, that it is not in the power of the Secretary of the Interior nor the Attorney General of the United States to finally determine the question as to who is the successor, if any exist, to the Northern Pacific Railroad Company; and the plaintiff says that there is no evidence showing that the Northern Pacific Railway Company is the successor of the Northern Pacific Railroad Company, and that fact is here denied.

X.

The plaintiff further shows, that under the provisions of Section 10 of the act of July 2, 1864, entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Tele-
graph Line from Lake Superior to Puget Sound, on
31 the Pacific Coast by the Northern Route" it was enacted—

"That all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription; and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage or lien made in any way, except by the consent of the Congress of the United States."

The plaintiff further says that on the 31st day of May, 1870, Congress passed a joint-resolution having reference to the Northern Pacific Railroad Company, in which appears the following:

"That the Northern Pacific Railroad Company be, and hereby

is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal and mixed, including its franchise as a corporation."

The plaintiff says, that under this joint-resolution, only one mortgage could have been given; after this mortgage had been executed, the power conferred by said joint-resolution upon the Northern Pacific Railroad Company was exhausted, and any subsequent mortgage given by said company would be ineffectual as a lien upon its property.

The plaintiff further shows that the claim of title by the defendants to said land is derived from the Northern
32 Pacific Railway Company who derived title from a patent issued by the United States; but said patent was issued to the said Northern Pacific Railway Company under a mistake of law and without authority. It appears, however, that an action was brought in the Circuit Court of the United States for the Eastern District of Wisconsin by the Farmers Loan & Trust Company against the Northern Pacific Railroad Company, Philip B. Weston, George R. Seldon, William S. B. Prentice, William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Company, to foreclose a second mortgage given by said Northern Pacific Railroad Company to the complainant covering its property west of the Missouri River. Such proceedings were had therein that a decree of foreclosure was rendered, and the property supposed to be covered by said mortgage, sold, and bid in by the Northern Pacific Railway Company. The lands east of the Missouri River supposed to belong to the Northern Pacific Railroad Company, were not covered by said mortgage, but by an order of the court dated June 5, 1899, were ordered sold by a special master. The United States was not made a party to these proceedings. The petitioners for said order were the receivers of the Northern Pacific Railroad Company, and such proceedings were taken in said court that it was "ordered and decreed that the prayer of said petitioner be and the same is granted, and that all the lands granted by Congress in aid of the construction and equipment of the railroad of the defendant, the Northern Pacific Railroad Company and
33 all the rights of said defendant under the several land grants made to it by Congress, in any such lands lying within the State of Minnesota, and State of North Dakota, east of the Missouri River, shall be sold at public sale to the highest bidder, in the following manner:

"1. Such sale shall be made by Alfred L. Cary, Esq., hereby

appointed special master for that purpose, who is hereby required to report his doings hereunder.

"II. All of said lands for which letters patent have issued to said defendant Northern Pacific Railroad Company, and the right to receive lands for which letters patent have not issued but which have been certified to said company, shall be sold in single sections, or subdivisions thereof, and all lands for which patents have not issued, and which have not been selected by, and certified to said company, but to which said Northern Pacific Railroad Company is entitled under said grants of Congress, and all rights of said Northern Pacific Railroad Company to receive from the United States any lands which have not been certified or patented to said railroad Company, whether under the grant expressed in the act of Congress of July 2, 1864, or any subsequent grant, together with all the right, title, interest and claim in or to said lands, and all its rights to receive from the United States patents therefor; and also all right, title, interest and equity in and to any other lands to which said Northern Pacific Rail-
34 road Company may be entitled, and which may have accrued or shall hereafter accrue to it under any of said land grants; and also all right, title, equity and interest in and to any lands covered by or included in any of said land grants and not hereinbefore specified, shall be sold in one parcel as to such lands and rights in each county, at the following places," etc.

The land in controversy being in St. Louis County, the order says:

"All of said lands and rights to Lands within the County of St. Louis, in the State of Minnesota, shall be sold at the Court House of said County at Duluth."

The plaintiff contends that the court was without authority to make this sweeping order, that there was no mortgage covering the lands of the company lying east of the Missouri River, and the act of Congress of July 2, 1864, Section 10, expressly forbid creating a lien upon the real or personal property of said company, consequently no lien could be created upon said lands by any order of the court.

The plaintiff further shows that in pursuance of said order, and in compliance therewith, the special master named did subsequently execute the same, and report that he did sell to the Northern Pacific Railway Company in consideration of the sum of $117,700.

"All of said lands within the County of St. Louis, in the State of Minnesota, for which patents had not issued, and

which had not been selected by and certified to said
35 Northern Pacific Railroad Company, but to which said railroad company was entitled under said grants of Congress, and all right of said railroad company to receive from the United States any lands within said county and state which had not been certified or patented to said railroad company, whether under the grant expressed in the act of Congress of July 2, 1864, or any subsequent grant by way of indemnity or otherwise, to said railroad company, together with all the right, title and interest and claim in or to any such lands and all its rights to receive from the United States patents therefor, and also all mineral and other reservations and exceptions of every nature and description contained in any conveyance or contract in respect of lands within said county and state at any time made by said railroad company or its receiver, or otherwise, and all rights, benefits, equity of redemption, title, interest or claim of said railroad company thereunder, and in and to all lands granted to it by the Congress of the United States within said county and state, and which might not be included in the sales under said decrees under the foregoing description of lands, for which letters patent had issued to said railroad company, and the right to receive lands for which letters patent had not issued, but which had been selected by and certified to said company, whether or not such lands were then held by or had been theretofore sold or contracted to be sold, by said railroad
36 company, or such receiver, or were claimed to have been sold under judicial proceedings, or for non-payment of taxes or for any cause soever, and whether or not the same stood in the name of said railroad company, it having been the intention to include every possible right, title and interest of said railroad company in and to any lands within said county and state covered by any grant to said railroad company by the Congress of the United States, and which might not be included in the sale under said decree under the foregoing description of lands for which letters patent had issued to said railroad company, and the right to receive lands for which letters patent had not issued, but which had been selected by and certified to said company, all subject, however, to a certain mortgage or trust deed, dated the first day of January, 1881, known as the General First Mortgage of said Northern Pacific Railroad Company, and executed by it to the Central Trust Company of New York as trustees, were offered and sold as one parcel, and were struck off to the Northern Pacific Railway Company."

This plaintiff further shows that on the 22nd day of September, 1899, Alfred L. Cary, as special master, by deed of

even date, attempted to convey to the Northern Pacific Railway Company the real and personal property reported by him to have been sold as above stated. In this conveyance no lands were described by legal subdivision or otherwise.

37 There appears in the deed the following recital:

"And whereas, at such sale all of said lands within the County of St. Louis, in the State of Minnesota, for which patents had not issued, and which had not been selected by and certified to said Northern Pacific Railroad Company, but to which said railroad company was entitled under said grant of Congress, and all rights of said railroad company to receive from the United States any lands within said county and state which had not been certified or patented to said railroad company, whether under the grant expressed in the act of Congress of July 2, 1864, or under any subsequent grant by way of indemnity or otherwise, to said railroad company together with all the right, title, interest and claim in or to any such lands and all its rights to receive from the United States patents therefor, and also all mineral and other reservations and exceptions of every nature and description contained in any conveyance or contract in respect to lands within said county and state at any time made by said railroad company or its receiver or otherwise, and all rights, benefits, equity of redemption, title, interest or claim of said railroad company thereunder, and in and to all lands granted to it by the Congress of the United States within said county and state, and which might not be included in the sales under said decrees under the foregoing description of lands for which letters patent had issued to said railroad com-

38 pany, and the right to receive lands for which letters patent had not issued, but which had been selected by and certified to said company, whether or not such lands were then held by or had theretofore been sold or contracted to be sold by said railroad company or such receivers, or were claimed to have been sold by said company or such receivers, or were claimed to have been sold under judicial proceedings, or for non-payment of taxes or for any cause soever, and whether or not the same stood in the name of said railroad company, it having been the intention to include every possible right, title and interest of said railroad company in and to any of the lands within said county and state covered by any grant to said railroad company by the Congress of the United States, and which might not be included in the sale under the said decree under the foregoing description of lands for which letters patent had issued to said railroad company and the right to receive lands for which letters patent had not issued, but which had been selected by, and certified to, said railroad company—

all subject, however, to a certain mortgage or deed of trust dated the first day of January, 1881, known as the General First Mortgage of said Northern Pacific Railroad Company, and executed by it to the Central Trust Company of New York, as trustees, were offered and sold in one parcel and were struck off to the Northern Pacific Railway Company."

39 And this plaintiff further shows, that at the time of the sale above referred to, the Northern Pacific Railroad Company had no interest visible or invisible upon which the same could attach. The land in controversy was located within the second indemnity of its grant, and its selections had been canceled and the land restored to the public domain; and no title to this land was in the Northern Pacific Railroad Company, until the selection had been made, and the selection approved by the Secretary of the Interior, such sale conveyed no title to the land in controversy.

XII.

And this plaintiff further shows that the Northern Pacific Railway Company, the pretended purchaser of this land under the order of the court heretofore mentioned at the sale of the property of the Northern Pacific Railroad Company by the special master as hereinbefore recited, had no power or authority to purchase the same, and the patent issued by the United States to the Northern Pacific Railway Company for this land, was issued without authority under a mistake both of law and fact.

The Northern Pacific Railway Company is the successor of the Superior & St. Croix Railroad Company, which was incorporated under the laws of the State of Wisconsin, and the Northern Pacific Railway Company succeeded to all the rights that the said Superior & St. Croix Railroad Company possessed, but no other or greater rights. That the legislature of Wisconsin did not grant to that company any authority to
40 hold and possess lands, other than such as might be necessary for the operation of said railroad. A copy of the act to incorporate the Superior & St. Croix Railroad Company, and the acts amendatory thereof and supplimental thereto, and the proceedings taken to change the corporate name of the Superior & St. Croix Railroad Company to Northern Pacific Railway Company is hereunto annexed marked Exhibit "D", and made a part of your plaintiff's bill of complaint.

XIII.

To the end, therefore, that Frederick Weyerhauser and John A. Humbird may respectively, full, true, direct and perfect

answers make, according to the best of their respective knowledge, information and belief, to all and singular the matters and charges aforesaid, and that as fully and particularly in every respect as if the same were here again repeated and they were thereunto particularly interrogated; and more especially that they may respectively set forth the particular sources from which their title to this land is derived, and whether such title is not deraigned from the United States through the Northern Pacific Railway Company, and other [mesne] conveyances, in the manner and form as herein stated.

That this action is brought to establish and declare this plaintiff's rights.

Wherefore, this plaintiff prays that this Honorable Court by its decree, will adjudge and decree that said defend-
41 ants hold the title to said land as trustees for the benefit of this plaintiff; and that defendants convey said land to him in fulfillment of said trust, and that the defendants and their heirs, and assigns, and all persons claiming or to claim by or under them, be forever barred and enjoined from claiming any title, right or interest in said land adverse to this plaintiff; and for such other relief as may be equitable and just.

And this plaintiff further says that the above described land is principally valuable for the timber thereon, and unless the defendants are restrained by an order of this court, the defendants will cause said timber to be cut and removed, and therefore this plaintiff prays that the defendants may be perpetually enjoined from cutting or removing from the land any timber standing or lying thereon, and that they may be similarly restrained, during the pendency of this action, from cutting or removing said timber from said land.

May it please this court to grant unto this plaintiff the writ of injunction, enjoining and restraining the defendants during the pendency of this cause, from selling or disposing of, or removing any timber cut, or caused to be cut by them, or by any person under the direction from the aforesaid premises, and from cutting or removing or selling, or disposing of, any timber now standing, or lying upon the said premises, or from cutting or attempting to create any charge upon the same, or any of said timber standing or lying thereon, or cut therefrom.

H. H. HOYT,

Solicitor and Counsel for Plaintiff. 310 Manhattan Building, Duluth, Minn.

42 State of Minnesota,
County of St. Louis—ss.

On this 1st day of October, A. D. 1905, before me personally appeared the above named Herbert H. Hoyt, and made oath that he has read the above bill subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated to be on his information and belief, and as to those matters he believes it to be true.

[Notarial Seal]

JOHN ARNOL KEYES,
Notary Public, St. Louis Co., Minn.

43 Exhibit A.

Timber and Stone Lands.—Sworn Statement.

(To be made in duplicate.)

Land Office at Duluth, Minn.

Dec. 17, 1897.

I, Richard B. Jones, of Duluth, County of St. Louis, State of Minnesota, desiring to avail myself of the provisions of the act of Congress of June 3, 1878, entitled "An Act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory", as extended to all the Public Land States by act of August 4, 1892, for the purchase of the SW¼ SE¼ of Section 7, Township 54, of Range 14, in the district of lands subject to sale at Duluth, do solemnly swear that I am a native of the United States of the age of 24, and by occupation Express Driver, that I have personally examined said land, and from my personal knowledge state that said land is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, or coal; that I have made no other application under said acts; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, or in any way or manner, with
44 any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself, and my post-office address is Duluth.

RICHARD B. JONES.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that

said affiant is to me personally known, and that I verily believe him to be the person he represents himself to be; and that this affidavit was subscribed and sworn to before me this 17th day of December, 1897.

F. L. RYAN, Receiver.

Timber Land, Act June 3, 1878.—Notice for Publication.

United States Land Office.

Duluth, Minn., Dec. 17, 1897.

Notice is hereby given that in compliance with the provisions of the act of Congress of June 3, 1878, entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada and Washington Territory," as extended to all the Public Land States by act of August 4, 1892, R. B. Jones, of Duluth, County of St. Louis, State of Minnesota, has this day filed in
45 this office his sworn statement No. 3377, for the purchase of the SW SE of Section No. 7, in Township No. 54, Range No. 14, and will offer proof to show that the land sought is more valuable for its timber or stone than for agricultural purposes, and to establish his claim to said land before the R. & R. of this office at Duluth, Minn., on Tuesday, the 22d day of March, 1898.

He names as witnesses:

NICHOLAS BANGS,
DAVID BANGS,
ALEXANDER FRAZER,
WIRT H. COOK,
All of Duluth, Minn.

Any and all persons claiming adversely the above described lands are requested to file their claims in this office on or before said 22d day of March, 1898.

WM. E. CULKINS, Register.

Certificate as to Posting of Notice.

United States Land Office.

March 22, 1898.

I, Wm. E. Culkin, Register of the Land Office, certify
Ques. 4.—Is it occupied, or are there any improvements that the above notice was by me posted in a con-
46 spicuous place in my office during the period of sixty (60) days and over, I having first posted the same on the 17th day of Dec., 1897.

I further certify that there are no adverse claims to the land herein described known to this office.

WM. E. CULKINS, Register.

Testimony of Witness under Acts of June 3, 1878, and August 4, 1892.

Nicholas Bangs, being called as a witness in support of the application of Richard B. Jones to purchase SW¼ SE¼ of Section 7, Township 54 N of Range 14 W 4th P. M., testifies as follows:

Question 1. What is your age, post-office address, and where do you reside?

Answer. 45 years; Duluth; same place.

Ques. 2. Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivisions? Ans. Yes.

Ques. 3. When and in what manner was such inspection made?

Ans. Fore part of Dec., 1897; waked all over the land.

on it not made for ditch or canal purposes or which

47 were not made by, or do not belong to the said applicant? Ans. No.

Ques. 5. Is it fit for cultivation? Ans. No.

Ques. 6. What causes render it unfit for cultivation?

Ans. Too stony.

Ques. 7. Are there any salines, or indications of deposits of gold, silver, cinnabar, copper, or coal on this land? If so, state what they are, and whether the springs or mineral deposits are valuable. Ans. No.

Ques. 8. Is the land more valuable for mineral or any other puposes than for the timber or stone thereon, or is it chiefly for timber or stone? Ans. Chiefly valuable for timber.

Ques. 9. From what facts do you conclude that the land is chiefly valuable for timber or stone?

Ans. Because the land is covered with a fair growth of salable pine timber.

Ques. 10. Do you know whether the applicant has directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which he may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except himself? Ans. No.

Ques. 11. Are you in any way interested in this ap-

48 plication, or in the lands above described, or the timber or stone, salines, mines, or improvements of any description whatever thereon? Ans. No.

NICHOLAS BANGS.

I hereby certify that each question and answer in the foregoing testimony was read to the witness before he signed his

name thereto, and that the same was subscribed and sworn to before me this 22d day of March, 1898.

WM. E. CULKINS, Register.

Timber and Stone Lands.

Testimony of Claimant.

Richard B. Jones, being called as a witness in support of his application to purchase the SW¼ SE¼ of Section 7, Township 54 N, Range 14 W 4th P. M., testifies as follows:

Question 1. What is your age, post-office address, and where do you reside? Answer. 24; yes; Duluth, St. Louis Co.

Ques. 2. Are you a native born citizen of the United States; and if so, in what State or Territory were you born?

Ans. Yes; Penn.

Ques. 3. Are you the identical person who applied to
49 purchase this land on the 17th day of Dec., 1897, and made sworn statement assigned by law before the Register (or Receiver) on that day?

Ans. Yes.

Ques. 4. Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivisions?

Ans. Yes.

Ques. 5. When and in what manner was such inspection made?

Ans. About Dec. 1, 1897; walked over the land.

Ques. 6. Is the land occupied; or are there any improvements on it not made for ditch or canal purposes, or which were not made by or do not belong to you?

Ans. No—none.

Ques. 7. Is the land fit for cultivation, or would it be fit for cultivation if the timber were removed?

Ans. No.

Ques. 8. What is the situation of this land, and what is the nature of the soil, and what causes render the land unfit for cultivation?

Ans. It is rolling land generally too stony and rocky.

Ques. 9. Are there any salines, or indications of deposits of gold, silver cinnabar, copper, or coal on this land? If so state what they are, and whether the springs or mineral deposits are valuable.

50 Ans. No.

Ques. 10. Is the land more valuable for mineral or any other purposes than for the timber or stone thereon, or is it chiefly valuable for timber or stone?

Ans. Chiefly valuable for timber.

Ques. 11. From what facts do you conclude that the land is chiefly valuable for timber or stone?

Ans. The standing timber is the only thing of any value on the land.

Ques. 12. What is the estimated market value of the timber standing upon this land?

Ans. About $500.00.

Ques. 13. Have you sold or transferred your claim to this land since making your sworn statement or have you directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which you may acquire from the Government of the United States may inure, in whole or in part, to the benefit of any person except yourself?

Ans. No.

Ques. 14. Do you make this entry in good faith for the appropriation of the land exclusively to your own use and not for the use or benefit of any other person?

Ans. Yes.

Ques. 15. Has any other person than yourself, or has any firm, corporation, or association any interest in the en-
51 try you are now making, or in the land, or in the timber thereon?

Ans. No.

RICHARD B. JONES.

I hereby certify that the above-named Richard B. Jones, personally appeared before me; that I verily believe affiant to be the person he represents himself to be and that each question and answer in the foregoing testimony was read to him in my presence before he signed his name thereto, and that the same was subscribed and sworn to before me at Duluth, this 22nd day of March, 1898.

WM. E. CULKINS, Register.

I hereby certify that I have tested the accuracy of affiant's information, and the bona fides of this entry by a close and sufficient oral cross-examination of the claimant and his witnesses, directed to ascertain whether the entry is made in good faith for the appropriation of the land to the entryman's own use and not for sale or speculation, and whether he has conveyed the land or his right thereto, or agreed to make any such conveyance, or whether he has directly or indirectly entered into any contract or agreement in any manner with any person or persons whomsoever by which the title that may be acquired by the entry shall inure in whole or in
52 part to the benefit of any person or persons except himself, and am satisfied from such examination

that the entry is made in good faith for entryman's own exclusive use and not for sale or speculation, nor in the interest nor for the benefit of any other person or persons, firm, or corporation.

WM. E. CULKIN, Register.

4-371.

(The testimony of two witnesses, in this form, taken separately, required in each case).

Testimony of Witness Under Acts of June 3, 1878, and August 4, 1892.

Alexander Fraser, being called as a witness in support of the application of Richard B. Jones to purchase the SW^1_4 SE^1_4 of Section 7, Township 54 N of Range 14 W. 4th P. M., testifies as follows:

Question 1. What is your age, post-office address, and where do you reside?

Answer. 55 yrs; Duluth; same place.

Ques. 2. Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivisions?

Ans. Yes.

Ques. 3. When and in what manner was such inspection made?

53 Ans. July, 1897; walked over it.

Ques. 4. Is it occupied, or are there any improvements on it not made for ditch or canal purposes or which were not made by, or do not belong to, the said applicant?

Ans. No.

Ques. 5. Is it fit for cultivation?

Ans. No.

Ques. 6. What causes render it unfit for cultivation?

Ans. Too Stony.

Ques. 7. Are there any salines, or indications of deposits of gold, silver, cinnabar, copper, or coal on this land? If so, state what they are and whether the springs or mineral deposits are valuable.

Ans. No.

Ques. 8. Is the land more valuable for mineral or any other purposes than for the timber or stone thereon, or is it chiefly valuable for timber or stone?

Ans. Chiefly for timber.

Ques. 9. From what facts do you conclude that the land is chiefly valuable for timber or stone?

Ans. Because the land is fairly well covered with merchantable pine timber.

Ques. 10. Do you know whether the applicant has directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which he may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except himself?

54 Ans. No.

Ques. 11. Are you in any way interested in this application, or in the lands above described, or the timber or stone, salines, mines or improvements of any description whatever thereon?

Ans. No.

I hereby certify that each question and answer in the foregoing testimony was read to the witness before he signed his name thereto, and that the same was subscribed and sworn to before me this 22nd day of March, 1898.

WM. CULKIN, Register.

Affidavit.

U. S. Land Office at Duluth Minn.

March 22, 1898.

I, Richard B. Jones, of Duluth, Minn., applying to enter (or file for) a Timber Claim, do solemnly swear that since Aug. 30, 1890, I have not entered under the land laws of the United States or filed upon, a quantity of land agricultural in character and not mineral, which with the tracts now applied for would make more than 320 acres.

RICHARD B. JONES.

Sworn and subscribed before me this 22nd day of
55 March, 1898, at my office in Duluth, St. Louis County.

W. E. CULKIN, Register.

The Duluth News Tribune.

Notice of Publication.

State of Minn.,
County of St. Louis—ss.

Came personally before me, Edward Hazer, and being duly sworn, deposes and says, that he is now and during all the time hereinafter mentioned has been one of the publishers and printers of the Duluth News Tribune, a daily newspaper printed and published in Duluth, County of St. Louis, on every day of each week, that he knows of his own knowledge that printed notice of proof of claim hereto attached, cut from the columns of said newspaper, was inserted and printed and

published in said newspaper, once in each week for ten successive weeks, and that all such publications were made in the English language. That said notice was first inserted, printed and published in said newspaper on Saturday the 18th day of December, 1897, and was printed and published therein each and every Saturday thereafter until and including Saturday the 19th day of February, 1898; that during all the time aforesaid said newspaper was a collector of local and general news, comments and miscellaneous literary items and regularly listed and published on every day of each week
56 from a known office of publication, said office being equipped with the necessary printing materials presses and skilled workmen for producing the same and has consisted of not less than four pages of five columns or more to each page, each column not less than 17¾ inches in length and never made up wholly of patent plates or advertisements, and has not been substantially a duplicate of any other newspaper and has been regularly delivered each week to more than 240 paid subscribers and that said newspaper composed and consisting as above set forth, was printed and published in the English language daily and generally circulated in St. Louis County for more than one year next preceding the date of 1st publication of said notice, that the publisher of said newspaper on Oct. 5, 1893, filed with the County Auditor of St. Louis County an affidavit setting forth the facts required by Section 2, Chapter 33, of the laws of the State of Minnesota for the year 1893.

Signed, EDWARD HAZER.

Subscribed and sworn to before me this 19th day of February, 1898.

[Seal] Signed, EDWARD C. WING.

Notary Public, St. Louis County.

57 Timber Land Act, June 3, 1878, Notice for Publication

United States Land Office.

Duluth, Minn., Dec. 17, 1897.

Notice is hereby given that in compliance with the provisions of the Act of Congress of June 3, 1878, entitled "An Act for the Sale of Timber Lands in the States of California, Oregon, Nevada and Washington Territory," as extended to all the public land States by Act of Aug. 4, 1892, Richard B. Jones, of Duluth, County of St. Louis, State of Minnesota, has this day filed in this office his sworn statement No. 3377 for the purchase of the SW¼ of the SE¼, Section 7, Township

No. 54, Range No. 14, and will offer proof to show that the land sought is more valuable for its timber or stone than for agricultural purposes and to establish his claim to said land before the Register and Receiver of this office at Duluth on Tuesday, the 22nd day of March, 1898.

He names as his witnesses Nicholas Bangs, David Bangs, Alexander Frazer and Wirt H. Cook, all of Duluth.

Any and all persons claiming adversely the above described lands are requested to file their claims in this office on or before the 22d day of March, 1898.

(Signed) WM. E. CULKIN, Register.

Duluth New Tribune, Dec. 18, 25, 1897. Jan. 1, 8, 15, 22, 29. Feb. 5, 12, 19, 1898.

58 F. L. C. Exhibit B. G. B. G.
August 30, 1905.

Richard B. Jones,
vs.
Northern Pacific Railroad Co.

The Commissioner of the General Land Office:

This is an appeal of Richard B. Jones from your office decision of December 2, 1901, holding for cancellation his cash entry allowed under act of June 3, 1878 (20 Stat. 89), as amended by the act of August 4, 1892 (27 Stat. 348), for the $SW\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 7, Township 51 N., R. 14 W., Duluth Land District.

The land in controversy lies within the second indemnity limits of the grant made in aid of the construction of the Northern Pacific Railroad, east of the City of Duluth, provision for which is found in the Joint Resolution of May 31, 1870 (16 Stat. at 373), and was selected by the Northern Pacific Railroad Co. Oct. 17, 1883. This selection remained of record until March 22, 1897, when it was cancelled pursuant to departmental decision in the case of the Northern Pacific Railroad Co. (23 L. D. 204), holding Duluth to be the eastern terminus of the company's grant, but was reinstated by your office letter of May 26, 1900, under the decision of the Supreme Court of the United States in the case of Doherty v. Northern
59 Pacific Railway Company (177 U. S., 421), holding the eastern terminus of the grant to be at Ashland, Wisconsin. Between the date of cancellation of the selection and before it had been reinstated, to-wit, on December 17,

1897, the said Richard B. Jones applied to purchase the tract under the timber and stone acts, supra., and after due publication and proof made entry thereof, December 10, 1898. At the date of the purchase, but not at the date of the application, the tract in controversy, with others, was withdrawn from entry by virtue of departmental order of February 28, 1898 (26 L. D., 265), but there was a provision in the order permitting the completion of all entries theretofore allowed.

It is contended upon the appeal, in substance:

1. That the Northern Pacific Railway Company has no legal or equitable claim upon the United States to be considered the successor in interest to the land-grant rights of the Northern Pacific Railroad Company, and that there is therefore no authority of law for the patenting of lands to the named company.

2. That the company's selection was and is void because no valid basis is assigned.

3. That the selection is irregular and void, because the selected land was not at date of selection the nearest available public land to the section alleged to have been lost in place.

4. That the timber and stone application of Jones, having been presented at a time when the tract in controversy was unappropriated public domain, his application was the equivalent of an entry, and that he thereafter, in accordance with the terms of the order of suspension of February 28, 1898, supra, had the right to complete the same by making proof and payment thereon.

60

5. That such application having been presented, and such proof and payment having been made, he had prior to January 1, 1898, in contemplation of law and within the meaning of the act of July 1, 1898 (30 Stat., 597, 620), purchased the land directly from the United States, that he had an entry prior to January 1, 1898, within the meaning of departmental instructions of February 14, 1899 (29 L. D., 103), and that therefore he is entitled to an adjustment of his claim under said act.

The question of the successorship of the Northern Pacific Railway Company to the land-grant rights of the Northern Pacific Railroad Company was considered by Attorney-General Harmon, February 6, 1897 (21 Opinions, 186), and referring to certain mortgage foreclosure proceedings this department was then advised that it should act upon applications for patents by the railway company upon the same considerations which should govern it in case there had been no foreclosure

and the applications had been made by the old company.

61 It was but recently urged before this Department that said opinion was ill-advised and unsound, both in law and fact. The matter was again submitted to the Attorney-General, and April 12, 1905, Attorney-General Moody considered the question, concluding as follows:

"It seems to me that the decision of my predecessor was correct, and accordingly have to advise you, the Secretary of the Interior, that, in my opinion, you should continue to be governed by the rule there laid down."

This question is not therefore open for further consideration by this Department. Hugh P. Ferguson v. Northern Pacific Railway Company (33 L. D.,—).

Appellant's second contention that the company's selection herein is void because of invalid basis, rests upon the allegation that the basis assigned lies within the overlapping limits of the grant to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior, made by the acts of May 5, 1864 (13 Stat. 64), and July 13, 1866 (14 Stat. 93), afterwards conferred by the state upon the Lake Superior and Mississippi Railroad Company, and the grant to the Northern Pacific Railroad Company, made by the act of July 2, 1864 (13 Stat. 365); that Congress did not make a double grant within these overlapping limits, and the date of the grant to the Lake Superior and Mississippi Railroad Com-

62 pany being prior to the grant to the Northern Pacific Railroad Company's road opposite the tract, and the tract having been approved to the former company prior to the definite location of the last named company's road, it was not granted to it, and therefore not lost to that company's grant.

This contention is unsound. This base land is not within the limits of the withdrawal of May 26, 1864, made on account of the grant of May 5, 1864, and the case does not therefore fall within the ruling of the Department in the case of Northern Pacific Railroad Co. v. Rooney (30 L. D., 403). It is true the base land was certified under the grant of May 5, 1864, but it was because of the fact that it fell within the indemnity limits of that grant as adjusted to the line of definite location, and was selected after the date of the Northern Pacific land grant, but prior to the definite location of that line of road. No question arises therefore in this case of the right of the Northern Pacific Company to satisfy its loss from its second indemnity-belt where the base land was in law and fact lost

prior to the grant of July 2, 1864. In the case of Northern Pacific Railroad Company (23 L. D., 264), it was held that because of a proviso in the act of July 2, 1864, supra, said company would not be entitled to receive indemnity for any of the losses sustained on account of the grant to the Lake Superior and Mississippi Railroad Company, made by
63 the act of May 5, 1864, between Thomson's Junction and Duluth. This decision was fundamentally wrong. It held that, because of an agreement, amounting to a consolidation between the two companies, whereby the Northern Pacific Company was authorized to use the other company's tracks between Thomson's Junction and Duluth, it thereby adopted this as its line of road between these points, that Duluth being on Lake Superior, the eastern point named in the company's charter, that point was therefore the eastern terminus of its grant, and that it therefore between these points being "upon the line of another railroad route to aid in the construction of which lands" had been therefore granted by the United States, was, because of the proviso above referred to, not entitled to indemnity for lands lost because of the prior grant. This view was declared erroneous by the Supreme Court of the United States in Doherty case, supra, which recognized the extension of the road eastward from Thomson's Junction to Ashland, Wisconsin, as part of the land grant road, and it follows that, as the route of the Northern Pacific Railroad is in no sense upon the same general line as that of the Lake Superior and Mississippi Railroad, the proviso in question is without application, and the contention that the Northern Pacific Company is not entitled to indemnity for this tract must fail.

With regard to the regularity of the indemnity selection of this land there can be no question but that, as or-
64 iginally presented, it was a proper selection under existing departmental regulations, the company at that time being relieved from the specification of a basis for its selections. It is claimed, however, that this selection should not receive departmental approval because there are, or were, at the time said selection was perfected by the assigning of a basis in 1893, available lands nearer to the loss then specified, and the question is therefore presented, whether, admitting the same to be true, the selection is a proper one under the terms of the granting act.

The third, or granting section of the act of July 2, 1864, supra, grants to the Northern Pacific Railroad Company—

"Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sec-

tions per mile, on each side of said railroad line, as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the directions of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

65

December 7, 1887, the question as to whether selections could be made within the first indemnity belt of the Northern Pacific land-grant for losses outside of the particular State or Territory in which the same occurred, was submitted to the Attorney-General for opinion, and in consideration thereof, Mr. Attorney-General Garland, in his opinion dated January 17, 1888 (8 L. D., 14, 17), after referring to the clause of the section above quoted providing for indemnity, says:

"The conditions of this indemnity, set forth in detail, under which the right or privileges of selection rests in the company are, lands shall have been lost out of the amount granted; selections must be made by the company of other lands in lieu of them; those selections must be made under the directions of the Secretary of the Interior; selections shall only be of alternate odd-numbered sections, and they must not be more than ten miles beyond the limits of the granted sections. These are all the limitations or conditions provided for by the act of 1864, subject to which the right to select is granted. Interpretation will not warrant the adding or another limitation that the lieu lands must be selected in the same State of Territory in which the lands were lost. To annex such an additional limitation to the words of the grant would be legislation and not construction."

66

It is further provided by said Section 3, of the act of 1864:

"That all mineral lands be, and the same are, hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated lands, in odd-numbered sections nearest to the line of said road may be selected as above provided."

It will be noted that this provision limits the selection of indemnity for losses to the grant on account of mineral lands, to "odd-numbered sections, nearest to the line of said road," etc.

There could be no good reason for attaching an additional condition upon selections made in lieu lands lost to the grant because mineral in character, and it might therefore be urged that it was intended to enlarge the limits within which such selections could be made. Thus, for general indemnity, selections were to be made from 'alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections,' being the granted sections, and for losses on account of mineral lands, to "odd-numbered sections, nearest to the line of said road."

67 Be this as it may, the lands made the basis for the selection in question were not lost to the grant because mineral in character, and the limitation "nearest to the line of said road," differs widely from a requirement that the selection must be nearest the tract lost and made the basis for the selection.

In the case of United States v. Colton Marble and Lime Company (146 U. S., 615, 618), it was said by the court:

"It might well be assumed, that very likely the Atlantic and Pacific Company would be called upon to select from the indemnity lands a portion sufficient to make good the deficiency in the granted limits. That right of selection was a prospective right, and if it was to be fully exercised, no adverse title could be created to any lands within the indemnity limits. Suppose, for instance, it should turn out that only half of the indemnity lands were necessary to make good the deficiency, and that one-half of such lands were well watered and valuable, while the remainder were arid and comparatively valueless, obviously the right of selection would be seriously impaired if it were limited to only the arid and valueless tracts."

In that case the court had under consideration the prospective right of the Atlantic and Pacific Railroad Company to odd-numbered sections within the indemnity limits of its grant, made by act of July 27, 1866 (14 Stat., 292), which
68 grant has the same indemnity provisions as the Northern Pacific act of 1864, with the exception that indemnity for losses to the grant on account of mineral lands is limited to "odd-numbered sections nearest to the line of said road and within twenty miles thereof." With regard to this latter provision it will be noticed that the selection is limited to odd numbered sections within the primary limits of the grant, as

those limits are twenty miles on each side of the road in Territories, thus, in effect nullifying the provision, because the sections from which selections are to be made were specifically granted in place.

The resolution of May 31, 1870, supra, providing for a second indemnity belt to the Northern Pacific grant, before quoted from, merely limits the place of selection to a belt "ten miles on each side of said road, beyond the limits prescribed in said charter," etc.

The act of 1864 and the resolution of 1870 each therefore establish a limit beyond which the company can not go in making its general indemnity selections, but in neither is there any requirement limiting such selections to the lands nearest the sections in which the losses to the grant occur, and to so limit such selections would attach a condition or limitation upon the right of selection not found in the granting acts.

That the right of selection conferred by these acts can not be restricted by the Secretary of the Interior seems clear.
69 His duty in the premises is to supervise the administration of the grant, but this authority does not permit him to abridge or enlarge the laws of Congress. We should see that the selections made in satisfaction of the grant are confined to the lands described in the granting act, but as between different sections, equally within the description contained therein, he can not say which may or which may not be selected, for in so doing he would be denying the railroad company the right to make the selection. See Willamette Valley and Cascade Wagon Road Co. v. Brunner (26 L. D., 357).

Attention has been called to the Circular of August 4, 1885 (4 L. D., 90), relating to railroad indemnity selections and requiring a designation of a loss as a basis for all indemnity selections, in which circular it is said that:

"Where deficiencies exist, for which indemnity is allowed by law, the lieu selections must be made from vacant, unappropriated land within proper sections and limits nearest the granted section in which the loss occurred."

This circular was issued before the opinion of the Attorney-General or the decision of the court referred to. Its main purpose was to require the specification of a loss as a basis for the selection thereby aiding the adjustment of the grant, for it required the designation of a loss as a basis for all selections previously approved and certified as well as for those then pending or thereafter to be made.

70 In respect to the portion of the said circular above quoted, in the manner of proximity between loss and selected tract, in view of what has been said, it can not be considered as a limitation upon the right of selection, but rather as suggesting a manner of designating the losses so as to aid in adjusting the grant. It might also be stated that it is learned upon inquiry at your office, that, at least as to lands within the second indemnity belt, a strict adherence thereto has not been enforced.

In the case of William Hickey (26 L. D., 612), it was held (syllabus):

"Indemnity selections are made under the direction of the Secretary of the Interior, and the enforcement of any requirement in the matter of a specification of a loss is only for his information, and as a bar to the enlargement of a grant, and may be waived whenever he deems such course advisable."

The conclusions hereinbefore reached answer appellant's fourth contention. The railway company's selection was improperly cancelled; the application of Jones initiated no right as against the company, and his purchase no claim which can be recognized by the land department, unless it is protected by the provisions of the act of July 1, 1898, supra, and this question involves consideration of the fifth and last specification of error on appeal.

71 If Jones had purchased this land from the United States prior to January 1, 1898, or if he had prior to that time made an entry thereof within the meaning of the act of July 1, 1898, he is entitled to an adjustment thereunder. It is believed that he had done neither of these things. While the application to purchase was presented prior to the date named, proof and payment were not made until after that date. There was no purchase prior to January 1, 1898. But it is contended that the application of Jones was the equivalent of an entry. No vested right is acquired by a timber and stone application. While such an application, if presented in accordance with the law and for land subject thereto, reserves the land from other disposition by the land department, no right is initiated as against the government, and prior to the submission and acceptance of final proof and the payment of the purchase price, the Secretary of the Interior may suspend the same from disposition and sale under the public land laws. Board of Control, Canal No. 3, State of Colorado v. Torrence (32 L. D., 472). This is precisely what was done in this case. The tract was withdrawn from entry by the order of February 28, 1898, and the purchase of Jones allowed

in violation of that order initiated no right falling within the remedial provisions of the act of July 1, 1898. F. W. Eaton and A. F. Huntoon v. Northern Pacific Railway Company (33 L. D. —).

72

The decision appealed from is affirmed. The papers are herewith returned.

Very respectfully,

THOS. RYAN,
Acting Secretary.

74 Exhibit D.

An Act.

To incorporate the Superior and St. Croix Railroad Company.

The people of the State of Wisconsin represented in Senate and Assembly do enact as follows:

Section 1. That I. W. Gates, R. G. Gates, E. W. Anderson, Jr., Hiram Hayes, S. H. Clough, Hiram Robbins, D. W. Maxon, John J. Talmadge, H. L. Palmer, S. B. Dresser, O. S. Powell and such other persons as may be associated with them who shall become stockholders in the association or corporation hereby created, in accordance with the provisions of this act, shall be and they are hereby created a body corporate and politic by the name and style of the Superior and St. Croix Railroad Company, and by that name shall have perpetual succession, be competent to contract and be contracted with, sue and be sued, implead and be impleaded, answer and be answered, defend and be defended in any court whatever. The said corporation may make, have and use a common seal, which it may alter or renew at pleasure; it shall be capable of acquiring by deed, lease or other conveyance, a fee simple or any less estate in lands, tenements, or easements in the same,

75 and of conveying any such estate or interest by deed, lease or other conveyance, or of holding such estate or interest, or any other estate necessary for the use of said railroad, either real, personal or mixed, and shall have and enjoy all the privileges, franchises or immunities incident to a corporation, and may do and perform all and singular the acts and matters which to any corporation it shall lawfully appertain to do and perform for the well being of said corporation.

Section 2. The said company by this act created is hereby authorized and empowered to survey, locate, and from time to time alter, change and re-locate (so as to not materially to change the route) and to construct and complete, perpetually to have, use and enjoy, maintain and operate the said railroad with one or more tracks or lines, over and along the following routes, that is to say: beginning at some convenient point on the west shore of the Bay of Superior or on the south shore of the Bay of St. Louis in the County of Douglas running thence southerly by route as direct as may be practicable through the counties of Douglas, Burnett, Polk, St. Croix, and Pierre via St. Croix Falls and Hudson to Prescott with a branch or extension running westerly from the above designated place of beginning in Douglas County to such point on the Minnesota boundary north of the Nemadji River as may be deemed desirable by the directors of said railroad company.

Section 3. The company hereby created shall have the
76 perpetual right, power and authority to transport, take and carry property and persons upon said railroad by steam or other power and to receive and store away any property in any of its depots or other buildings, and to make, construct, maintain and use all such switches, turn outs, side tracks as it shall deem necessary, and also to houses, warehouses, car houses and shops, engine houses and all other buildings, fixtures and things for the accommodation of said company and its roads and those using the same. And said railroad company shall have power to connect its road with any other railroad and to operate the same or to run in connection with any such railroad in such a manner as may be agreed upon between the boards of directors of this company and any such railroad. And any railroad company or association having a railroad built or partly built running in the direction of the line of railroad which the railroad company hereby created, is authorized to construct and operate and which this company by its act created shall agree to use or connect with is hereby authorized to make such lease or sale to this company or corporation perpetually or for a limited time of the whole or any part of their railroad so constructed or partly constructed, together with the rolling stock, machinery, buildings, tenements or fixtures, and all other property, real, personal or mixed, of the said company or association, together with its franchises,
rights, privileges and immunities, or to sell the same,
77 and in consideration of such lease or sale to take or receive such rents or payments as may be agreed upon.

Section 4. The said company shall have the right, authority and power, and it is hereby authorized and empowered to construct its railroad along and upon a crop under or over any public or private highway, road or streets, plank road or railroad if the same shall be necessary, but the said company shall put such highway, road, street, plank road or railroad in such condition and state of repair as not to impair or interfere with the free and proper use and also to erect and maintain all necessary bridges for the use of their railroad over any stream of water or water course at such points of crossing the same as said road may be located, with all necessary abutments, piers, arches and foundations.

Section 5. It shall be lawful for the company hereby created, and it shall have the power and authority by its officers, engineers, agents, servants and workmen, to enter upon any land for the purpose of exploring, surveying, locating and determining the routes of said railroads and when said routes or any portion thereof shall be determined by resolution, adopted by its board of directors, it shall be lawful for said company,

and it shall have the right, power and authority by its officers, engineers, agents, contractors, surveyors, servants and workmen, at any time, to enter upon, take possession, occupy and use any land along and including the line of said route not exceeding one hundred feet in width. It shall also be lawful
78 for said company and it shall have the right, power and authority, at any time, to enter upon, take, possess and occupy and use any other lands beyond said limits of one hundred fet which the directors shall, by resolution adopted by them, (a copy of which shall be recorded at the expense of said company in the office of the register of deeds, in the county in which said lands are located), declare to be necessary for the use of said company for the purpose of erecting depot buildings, station houses, machine shops, freight houses, warehouses, engine houses or buildings or fixtures of any kind, or ground about the same, for the convenient operation of the road or for making drains or giving proper direction to water courses, or of directing or changing the channel of water courses, or for the purposes of removing such substances or things as may endanger, obstruct, or interfere with the free use of said road, or for the purpose of depositing earth, gravel, stone, timber or other material for embankments, structures or superstructures necessary to the construction, repair or removal of said road. Said company shall, however, at such time and in such manner as is provided by, and in this chapter and act, be liable to pay the full value of all earth, gravel, stone, timber and land which may be so as aforesaid, taken, possessed, occupied and used for any of the purposes aforesaid, which is the private property of either persons or corporations, which value (unless the owner thereof and said company shall agree as to the same), shall be ascertained and determined in the
79 manner hereinafter provided; and whenever the same shall have been paid, tendered or deposited, as provided in this act, and estate in and to all and every such lands in fee simple, absolute forever, shall be and become vested in said company by virtue thereof, and of the provisions of this act, and by the same means a complete title shall vest in said company in and to all such earth, gravel, stone and timber; and whenever said company shall deem that such property or any part or portion of such property shall no longer be necessary for the purposes for which the same were taken, it is hereby authorized to lease or sell the same or any part thereof.

Section 6. On the completion of said road, or any part thereof, it shall be lawful for said company, and it is hereby authorized and empowered, to demand and receive such sum or sums of money for the transportation of persons and

of property and for the storage of property as it shall from time to time deem reasonable.

Section 7. Said company hereby created shall also have full power and authority to transport persons and property in boats, vessels, barges, and other water craft on any of the navigable waters which its said railroad or roads run to or connect with, and to receive and collect reasonable compensation for the same and for that purpose may build or purchase, own and use such boats, vessels, barges and other water craft as it may require.

Section 8. The company hereby created shall be capable in law of taking and holding any land granted to it by the government of the United States or of this state or by individuals or corporations to aid in the construction of its road and may also pledge, mortgage or otherwise dispose of all their rights, title and interest in and to said lands and in any other estate, real, personal or mixed, of which they may be seized at the time of the execution of such mortgage or which they may acquire subsequently thereto, in such manner and on such terms as the directors may thing proper.

Section 9. All the affairs of said company shall be managed by a board of directors who shall be stockholders and who are hereby invested with all the powers of the corporation. They shall be chosen annually by ballot by the stockholders at the annual meeting of the company, which shall be held on such notice and at such time as shall be prescribed by the by-laws and at such place as shall be prescribed by the board of directors and stated in such notice. At all meetings of the stockholders every stockholder shall be entitled to one vote for each share of stock held by him or her and may vote in person or by proxy duly authorized, and no business shall be transacted at any meeting of the stockholders unless a majority of the stock subscribed is represented. In all elections of directors those stockholders equal to the number to be elected having the greatest number of votes shall be deemed and declared duly elected. The elections shall be conducted in such a manner as shall be prescribed by the by-laws of the company, and if from any cause an election of directors shall not be had at the time when by the provisions of this act or of the by-laws, it should be had, the same may be held at any other time on notice to be given as aforesaid, and until such election be had, the directors of the preceding year shall continue to act and the corporation hereby created shall not forfeit or loose any of its privileges, franchises or immunities for a less period than ten consecutive years. The board may at any time increase or diminish the number of

directors to be elected at the next annual meeting of the stockholders, and the number to be elected shall be specified in the notice of election, but shall never be less than five or more than eleven.

Section 10. A majority of the board of directors shall constitute a quorum for the transaction of any business. They shall meet at such times and places, and be convened in such manner as they shall decide upon. They shall elect one of their own number to be president and one to be vice president. The president shall, when present, preside at all meetings of the board and of the stockholders and when absent the vice president shall discharge the duties of the president, and when both are absent the directors may appoint a president pro tem. The board of directors shall have power to appoint an executive committee and prescribe its powers and duties to appoint a secretary, treasurer and such engineers, superintendents, agents and other officers as they may deem necessary and remove them at pleasure, prescribe their duties and compensation, and may demand adequate security for the discharge of their respective duties and trusts.

82 Section 11. The persons named in the first section shall be the first directors and shall hold their offices until the first Wednesday of May, A. D. 1871, and until others are chosen in their places, and in case of vacancy in the directors, or by reason of the death or resignation of any director, or of his ceasing to be a stockholder, it may be filled by the remaining directors until the next annual election or until some other person shall be elected to fill the same. The directors herein named may appoint three persons, who shall be stockholders to be inspectors at the first election after which the stockholders shall choose three such inspectors at the annual elections. If no inspectors are chosen the directors may appoint three from time to time. If at any time an election of directors shall not take place on the day appointed by this act, the corporation shall not for that cause be dissolved, but an election may be held on another day in such manner as shall be prescribed by the directors or provided for the by-laws.

Section. 12. The said company shall have authority and power and it is hereby authorized and empowered in its corporate capacity to borrow any sum of money from any person or persons, corporation or body politic of any kind, and to make, execute and deliver all the necessary writings, notes, bonds, mortgages, or other papers and securities in amount and kind as may be deemed expedient by said corporation in consideration of any such loan or in the dis-

charge of any liabilities that it may incur in the con-
83 struction, repair, equipment or running of said road and the powers of said corporation for the purposes aforesaid and for all purposes necessary to carry out the objects of said company, viz: the construction of a railroad from and to the points aforesaid, are hereby ratified and confirmed and the contracts and official acts of said company declared binding in law and equity upon said corporation and upon all other parties to such contracts. Said company shall also have authority and power and it is hereby authorized and empowered in its corporate capacity to make, execute, issue and deliver its bonds and obligations from time to time and at any time in such an amount that all the bonds of said company outstanding at any one time will not exceed the amount of the capital stock of said company. The directors of said company are hereby authorized and empowered to prescribe by resolution to be by them adopted, the sum or sums for which each of said bonds shall be issued, the time or times and place or places when and where the principal and interest of the same shall be payable and whether payable to order or to bearer or how otherwise negotiable, the rate of interest which such bonds shall bear and the manner and form in which the interest coupons annexed to them shall be executed; and to secure the payments of any or all of such bonds the said corporation is hereby authorized and empowered in its corporate capacity to make, execute and deliver a mortgage or deed of trust upon the whole or any part of its railroad constructed or authorized to be constructed,
84 and of any or all of its real estate, personal, or mixed in possession or expectancy owned and acquired, or to be thereafter owned and acquired by said corporation; and the said company is also hereby authorized and empowered in and by such mortgage or deed of trust to confer upon the trustees or mortgagees full and ample powers, to enter into and upon, and to take possession of, have, use and enjoy or to sell and dispose of the whole or any part of said railroad or its estate, together with the functions appertaining to said railroad, and all corporate and other franchises, rights and privileges of said corporation; and the directors of said company are herby authorized and empowered to prescribe by resolution adopted by them all matters relating to the form and terms of any such mortgage or deed of trust, and of its execution and delivery, and they are authorized to provide for the periodical payments to such trustee or receiver as they shall appoint a certain sum to create a sinking fund with which to pay off or discharge at or before maturity any or all of the bonds by them authorized to be issued; and also

to provide the manner in which trustee or receiver shall pay out or dispose of said sinking fund, and to authorize him to designate by lot or in any other suitable manner, the bond or bonds to the payment of which such sinking fund or any part of it shall be applied and the said board of directors are hereby authorized and empowered to sell, pledge, hypothecate or otherwise dispose of, either for money, work or material, to be used in the construction and equipment of said
85 railroad, all or any portion of such mortgage bonds, or other securities or bonds received from any county town, village or city at part or at such price less than par as the said directors may, by resolution to be by them adopted, deem advisable; any such mortgage or deed of trust and every discharge or satisfaction thereof may be recorded in the office of the secretary of state in a proper book kept for that purpose and the certificate of such recording endorsed on such mortgage or deed of trust shall have the same effect as if such mortgage or deed of trust was recorded in the several counties through which such road may run, and such record in the office of the secretary shall be sufficient notice to all persons.

Section 13. The company hereby created shall for all and every of the lands and property, which shall appropriate, take, possess, occupy or use (unless the same being donated to them pay the value thereof at the time thereof at the time and in the manner herein provided; and such value shall be ascertained, fixed and determined by mutual agreement between the said company and the owners of such land and property respectively, or by and through the medium and appraisement and determination or award of commissioners appointed as hereinafter provided.

Section 14. When the said corporation shall not agree with the owner or owners of such required land for the purchase thereof or as to the compensation to be paid therefor, or when, by reason of the legal incapacity or of absence of
86 such owner or owners, no such agreement can be made, then and in that case it shall be lawful for any judge of the supreme court or county courts of this state on application of the said company or the owner or owners of any such land and at the cost and charge of said company to appoint three disinterested persons residing in the county through which the said road runs whose duty it shall be to view and examine the lands so taken with the buildings and improvements, if any thereon, and to estimate the value of the lands so taken and required by said company, and all the

damages which the owner or owners thereof shall sustain or may have sustained by reason of the taking of the same for the construction and use of said road or works appertaining thereto. And it shall be the duty of said company or of the owner or owners aforesaid, as the case may be, to give three weeks notice of their application to the judge of the supreme, circuit or county courts, for the appointment of said commissioners to be published for three successive weeks in a newspaper published (if there be any) in the county in which such land may be situated, and the affidavit of the printer or publisher shall be sufficient legal evidence of such publication; and the persons so appointed before entering upon the discharge of such duties shall take an oath before some justice of the peace or other person competent by law to administer oaths, faithfully and to the best of their ability to examine the lands so taken or required by said company and impartially to estimate and appraise the value of the same and the damage or in-
87 jury which the owner or owners thereof shall have sustained or may sustain by reason of the taking and use thereof by said company, whereupon such commissioners shall proceed to examine the premises and estimate the value of such land and the amount of damage, and they, or a majority of them, shall make a report in writing of such valuation under their hands and seals to the circuit court of the county where the land lies, and shall return the same within ninety days after their appointment to the clerk of the circuit court of the county where they reside, and it shall be the duty of the said clerk to immediately file the same; and in case no appeal shall be made within thirty days after the filing of the said report as hereinafter provided then the said clerk shall record the same at the expense of said company and judgment of the said court shall be entered thereon on motion of either party at any term of said court; provided, that either party may appeal to said court within thirty days after said report shall have been filed in the clerk's office and such appeal shall be tried in the same manner as other issues on trial in said court; and the jury impaneled to try the same shall find the value of the land so taken as required by said company and the damages which the owner or owners thereof shall have sustained by the taking of the same and the judgment of the said court shall be entered accordingly; provided, also, that it shall not be lawful for the said commissioners or said court to proceed in the assessment of damages or in the valuation of any land or materials as aforesaid in the absence of the owner
88 or owners, his, her or their agents or attorneys unless it is shown to them by competent testimony that the said owner or owners shall have had at least five days notice of the time and place at which such assessment or valuation

was to be made or that the said owner or owners are absent from the State of Wisconsin and if the said owner or owners shall be minors or non compos mentes or absent from the state the service of notice may be made on the guardian or trustee, if there be any, or in such manner as the court may direct; provided, also, that upon the making and filing of the report as aforesaid and payment in legal tender of the amount of any valuation or appraisal specified therein to the owner or owners of any such lands his, her or their legal representatives or payment thereof into the circuit court of the county in which such lands shall be situated for the owner or owners thereof the said company, their agents or the contractor for making or repairing said railroad, may immediately take and use the same without awaiting the issue of any appeal brought thereon; and, provided, also, that in case of an appeal as aforesaid, by the owner or owners of such land, the said company immediately on notice of the perfection of such appeal shall pay into court to abide the judgment therein the amount awarded by such commissioners, and in case of any appeal by the company it shall be the duty of such company to execute a bond with sufficient surety to be approved by the court, conditioned to pay any judgment that may be rendered
89 therein and to abide by the order of the court in the premises; such bond shall be filed at the time of entering the appeal, and in case of neglect or refusal unless further time so to do shall have been granted by the court, the appeal may be dismissed on motion. Whenever any judgment shall have been entered as herein provided for the value of any lands or for any damages for taking and using the same and the amount specified in such judgment shall have been paid or tendered to the owner or [owner] of such lands, his, her or their legal representatives, the said company shall be entitled to the estate and interest in the same as fully as if it had been conveyed in fee simple and if such valuation be not received when tendered it may at any time thereafter be received or may be collected from said company by action at law at the cost and expense of the person or persons entitled to the same, provided that the costs of any proceedings and judgment specified in the last preceding section shall be taxed by the court and paid by such company except in cases when upon appeal the verdict of the jury shall be for the same or for a less sum than that reported by the commissioners.

Section 15. The capital stock of the company hereby created shall in the first instance be five millions of dollars, which capital stock may be increased to any sum not exceeding ten millions of dollars; the said capital stock to be divided into shares of one hundred dollars each.

Section 16. The several counties, towns, cities and
90 villages upon or contiguous to the line of the said road, by this act authorized to be constructed as the same may be hereafter located and established, are and each of them is hereby authorized to aid in the construction of said railroad by subscribing to the stock of the company and paying for the same in money, and levying a special tax to raise money for that purpose, or by issuing bonds to said company in payment for said stock and levying taxes to pay the interest as it accrues upon said bonds, and to establish a sinking fund for the gradual redemption and ultimate full redemption of said bonds at maturity; and for these purposes the boards of supervisors or officers of such counties or towns; the boards of trustees of such villages, and the common council of such cities respectively and severally shall have power to negotiate and arrange the terms and conditions upon which such aid shall be granted; to enter into all proper contracts with said company in relation to the same and to adopt such ordinances and regulations pertaining thereto or to the taxes to be levied under this act as may be expedient and proper and consistent with law; provided, that before any such aid shall be granted or contracted for by any such county, town, village or city, the question of granting the same shall be submitted to a vote of the electors thereof respectively, as hereinbefore provided.

Section 17. Whenever the president and secretary of the said Superior and St. Croix Railroad Company shall certify under their hands and the seal of the said company to
91 the authorities of any such county, town, city or village that the route of said railroad has been located through or contiguous to such county, town, village or city, it shall be the duty of the authorities thereof hereinbefore mentioned, to call a special election to determine the question whether aid shall be granted to said company in the manner prescribed in the preceding section of this act, such election shall be called, notice thereof shall be given, the form of ballots shall be prescribed and all regulations relating to the same be determined by the proper authorities hereinbefore mentioned, of such counties, towns, villages and cities so that the question be fairly submitted to a vote of the electors. In case at any such election the majority of votes shall be against granting such aid the proper authorities may afterward in their discretion call another election upon the same subject and the same shall be conducted in a like manner.

Section 18. If at any election authorized by this act any such county, town, village or city shall vote in favor of granting such aid by a majority of the votes cast at such election then the authorities thereof shall have and exercise in their

discretion the powers conferred upon them by the preceding sections of this act and all the contracts made by them by virtue thereof shall be valid and enforcible according to the true intent and meaning thereof.

Section 19. The several counties, towns, villages and cities which shall subscribe for the stock of said company as authorized by this act, are hereby authorized severally to
92 own, control and dispose of the same in the same manner as an individual might do, and to vote upon the same by agents, duly authorized, at an election held by the stockholders of the said company.

Section 20. All property which the company hereby created is authorized to appropriate, take, possess, hold or use by making payment therefor, is hereby declared to be taken for public use as soon as the company shall so appropriate, take, possess, hold or use the same.

Section 21. It is hereby declared that in the judgment of the legislature of this state the objects of the corporation hereby created, cannot be attained under the general laws.

Section 22. This act is hereby declared to be a public act and the same immediately after the passage thereof shall be printed by the state printer and be in full force and effect from and after its passage.

J. M. BINGHAM,
Speaker of the Assembly.

THAD. C. POUND,
President of the Senate.

Approved March 15, 1870.
Lucius Fairchild, Governor.

An Act

To amend Chapter 326 of the private and local laws
93 of 1870, entitled "An act to incorporate the Superior and St. Croix Railroad Company."

The People of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

Section 1. Section one of Chapter 326 of the private and local laws of 1870, is hereby amended so as to read as follows: "F. W. Gates, R. G. Coburn, E. W. Anderson, Jr., Hiram Hayes, S. H. Clough, Hiram Robbins, D. W. Maxon, John J. Talmadge, H. L. Palmer, S. B. Dresser, O. S. Powell, James Edwards and Peter E. Bradshaw, and such other persons as may be associated with them, who shall become stockholders in the association or corporation hereby created in accordance with

the provisions of this act, shall be and they are hereby created a body corporate and politic by the name and style of the Superior and St. Croix Railroad Company, and by that name shall have perpetual succession, be competent to contract and be contracted with, sue and be sued, implead and be impleaded, answer and be answered, defend and be defended in any court whatever. The said corporation may make, have and use a common seal which it may alter or renew at pleasure; it shall be capable of acquiring by deed, lease or other conveyance a fee simple or any less estate in lands, tenements or easements in the same, and conveying any such estate or interest by deed, lease or other conveyance, and of holding such estate or interest, or any other estate necessary for the use of the said railroad, either real, personal or mixed, and shall have and
94 enjoy all the privileges, franchises and immunities incident to a corporation, and may do and perform all and singular the acts and matters which to any corporation it shall lawfully appertain to do and perform for the well being of said corporation."

Section 2. Section eleven of said chapter is hereby amended so as to read as follows: "The persons named in the first section shall be the first directors, and unless sooner superseded by an election of directors at the first annual meeting of the company, shall hold their offices until the first Wednesday of May, A. D. 1871, and until others are chosen in their places; and in case of vacancy in the directors, by reason of the death or resignation of any director, or of his ceasing to be a stockholder, it may be filled by the remaining directors until the next annual election, or until some other person shall be elected to fill the same. The directors herein named may appoint three persons, who shall be stockholders, to be inspectors at the first election, after which the stockholders shall choose three such inspectors at the next annual election. If no inspectors are chosen, the directors may appoint three from time to time. If at any time an election of directors shall not take place on the day appointed by this act, the corporation shall not for that cause be dissolved, but an election may be held on another day, in such manner as shall be prescribed by the directors, or provided for by the by-laws."

95 Section 3. This act shall take effect and be in force from and after its passage.

WILLIAM E. SMITH,
Speaker of the Assembly.
THAD. C. POUND,
President of the Senate.

Approved January 20, 1871.
Lucius Fairchild, Governor.

An Act

To amend Section 2, Chapter 326 of the private and local laws of 1870, approved March 15, 1870, entitled "An act to incorporate the Superior and St. Croix Railroad Company."

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

Section 1. Section two of said act is hereby amended so as to read as follows: Section 2. The company by this act created are hereby authorized and empowered to survey, locate and from time to time alter, change and re-locate (so as not materially to change the route,) and to construct and complete, perpetually to have, use and enjoy, maintain and operate the said railroad with one or more tracks or lines, over and along the following routes, that is to say: beginning at some convenient point on the west shore of the Bay of Superior, or on the south shore of the Bay of St. Louis, in the County
96 of Douglas, running thence southerly by a route as direct as may be practicable, through the counties of Douglas, Burnett, Polk, St. Croix and Pierre via. St. Croix Falls and Hudson to Prescott, with a branch or extension running westerly from the above designated place of beginning, in Douglas County, to such a point on the Minnesota boundary, north of Nemadji River, as may be deemed desirable by the directors of said railroad company; provided, said company shall have the right to construct this line of road along the westerly shore of the Bay of Superior, from the extreme end of Connor's Point to the southerly end of said bay, or such point thereof as may be deemed desirable by the directors of said company, and shall have the authority to construct and maintain a bridge across the St. Louis River at any point at or above Connor's Point in said County of Douglas, whenever the same shall be assented to by resolution of the Board of Supervisors of the town of Superior.

Section 2. This act shall be in force after its passage and publication.

W. E. SMITH,
Speaker of the Assembly.

THAD. C. POUND,
President of the Senate.

Approved March 16, 1871.
Lucius Fairchild, Governor.

97 An Act.

To amend Chapter 326 of the private and local laws of 1870, entitled "An act to incorporate the Superior and St.

Croix Railroad Company," and Chapter 328 of the private and local laws of 1871, entitled "An act to amend Section 2, Chapter 326, of the private and local laws of 1870, approved March 15, 1870, entitled "An act to incorporate the Superior and St. Croix Railroad Company."

The People of the State of Wisconsin represented in the Senate and Assembly do enact as follows:

Section 1. Section 2 of Chapter 326 of the private and local laws of 1870, entitled "An act to incorporate the Superior and St. Croix Railroad Company," as amended by Chapter 328 of the private and local laws of 1871, entitled "An act to amend Section 2 Chapter 326 of the private and local laws of 1870," approved March 15, 1870, entitled "An act to incorporate the Superior and St. Croix Railroad Company", is hereby amended so as to read as follows:

Section 2. The said company is hereby authorized and empowered to survey, locate and construct, and to acquire, by purchase or otherwise, and to equip, maintain, operate and perpetually to have, use and enjoy, a railroad or railroads, with one or more tracks from a point or points on the Bay of Superior, at the west end of Lake Superior, in Douglass County, Wisconsin, to be selected by the board of directors, upon such route or routes as such board shall adopt, to such point or points on the Minnesota
98 state line as such board shall select, and thence westward, upon such route or routes as said board shall adopt, to such point or points on the Pacific coast as such board shall select; and from said point or points in Douglas County easterly, upon such route or routes as said board shall adopt to or near Ashland, in the county of Ashland, in the State of Wisconsin, and thence by such route or routes and to such point or points in the State of Michigan as such board shall select; also from said point or points in Douglas county, upon such route or routes as said board shall adopt, through the counties of Douglas, Burnett, Polk, St. Croix and Pierre, or any of them, to Prescott, on the Mississippi river, with a branch from some point in one of said counties to be selected by the board of directors, to St. Paul and Minneapolis, Minnesota, or to either of said places; also from said point or points in said Douglas county or from some point to be selected by such board on any railroad or railroads which the said company is or hereafter may be authorized to construct or otherwise acquire, upon such route or routes as such board shall adopt, through the states of Wisconsin and Illinois, to or into the city of Chicago in the County of Cook, in said last named state. And the said company is further authorized and empowered to survey, locate, construct, and to acquire by purchase or other-

wise, and to equip, maintain and operate, and perpetually to have, use, possess and enjoy, branch lines of railroad from it to main line or lines in and into or through any state or territory of the United States, or extending into or lying within the Dominion of Canada, or any portion or province thereof, from and to such points as shall be determined by such board of directors.

Section 2. Section 3 of said Chapter 326 is hereby amended so as to read as follows: Section 3. The said company shall have the perpetual right, power and authority to transport, take and carry property and persons upon such railroad or railroads, by steam and other motive power, and to receive and store any property in any of its depots or other buildings, including elevators, and to make, construct, maintain, acquire, and use all such switches, turnouts, side tracks, spur and other tracks as it shall deem necessary; and also to construct, erect, acquire and maintain all such depots, station houses, warehouses, car houses, shops, engine houses, elevator and other buildings, fixtures, structures and things necessary or convenient for use by said company in the operation of its railroad and in the transaction of its business as a carrier of freight and passengers. And said company shall have power to connect its railroad or railroads with any other railroad or railroads, and to operate the same under a lease or otherwise, or to run in connection with any such railroad or railroads, in such manner as may be agreed upon between the board of directors of said company and the board of directors of the company or companies owning or operating any such connecting railroad or railroads. And any railroad company, person, association or corporation having a railroad or railroads, constructed or partly constructed running in the direction of the line or lines of railroad which the said company is by this act or may hereafter be authorized to construct, acquire and operate, which said company shall agree to use or connect with, is hereby authorized to make to said company, (created by said Chapter 326), a lease, sale or trackage arrangement, perpetual or for a time limited, of the whole or any part of the said railroad or railroads so constructed or partly constructed, together with the rolling stock, machinery, buildings, tenements or fixtures, and all property, real, personal or mixed, of the said railroad company, person, association or corporation, together with its or their franchises, rights, privileges and immunities, and in consideration of such lease, use or sale, to take or receive such rent, commutation of rental, payment or other consideration as may be agreed upon.

Section 3. Section 4 of said Chapter 326 is hereby amended to as to read as follows: Section 4. Said company shall have

the right, authority and power, and it is hereby authorized and empowered subject to the provisions of section 1836 of the revised statutes, to construct, maintain and operate its railroad or railroads across, along or upon any stream of water, watercourse, street, highway, plank road, turnpike or canal which its route or routes shall intersect or touch; to carry any highway, street, turnpike or plank road which it shall touch, intersect or cross over or under its tracks, as may be most expedient for the public good; to change the course and
101 direction of any highway, street, turnpike or plank road, when made necessary or desirable to secure more easy ascent or descent by reason of any embankment or cut made in the construction of its railroad or railroads, and to take land necessary therefor, provided such highway or road be not so changed from its original course more than six rods, nor its distance thereby lengthened more than five rods. And the said company shall also have power, and it is hereby empowered, to cross, intersect, join and unite its railroad or railroads with any railroad now or hereafter constructed on any point on its route, and upon the grounds of such railroad corporation with the necessary turnouts, sidings and switches and other conveniences, in furtherance of the objects of its connection. And the said company shall also have power, and it is hereby empowered, to erect, purchase and maintain all necessary bridges for the use of its railroad or railroads, main and branch, over any stream of water, or watercourse, at such point or points of crossing the same as said railroad or railroads may be located or constructed, together with all necessary abutments, piers, arches, foundations and other structures.

Section 4. Section 5 of said Chapter 326 is hereby amended so as to read as follows: Section 5. It shall be lawful for the said company, and it is hereby authorized and empowered, by its officers, engineers, servants and workmen to enter upon any land or lands for the purpose of exploring, surveying,
102 locating and establishing the route or routes of said railroad or railroads; and when the said route or routes or any portion thereof shall be determined by resolution adopted by its board of directors it shall be lawful for said company, and it is expressly authorized and empowered, to purchase and hold such land or lands for right-of-way, side-tracks, spur-tracks, watertanks, construction of road bed and maintainance of same, station houses, warehouses, elevators, engine houses, shops, and for such other purposes as may be necessary, usual or convenient for the operation of said railroad or railroads or in connection therewith; and whenever said company cannot agree with the owners and other parties interested in any such land upon the price to be paid therefor, or for the occupa-

tion thereof or for any interest therein, it shall have the right, and it is hereby expressly authorized and empowered, to acquire the same by condemnation proceedings, to the extent and and in the manner provided by Sections 1845 to 1856 inclusive of the revised statutes of 1878.

Section 5. Section 6 of said Chapter 326 is hereby amended so as to read as follows: Section 6. Upon the completion or acquisition of said railroad or railroads, or any part thereof, it shall be lawful for said company, and it is hereby authorized and empowered to demand, collect and receive such sum or sums of money for the transportation of persons and property, and for the storage of property as shall be reasonable.

Section 6. Section 7 of said Chapter 326 is hereby
103 amended so as to read as follows: Section 7. Said company shall also have full power, and it is hereby expressly authorized to carry and transport persons and property in boats, steamships, vessels, barges and other water craft upon any of the navigable waters which its railroad or railroads shall run to, over or connect with, and to demand, receive and collect such compensation for the same as it shall from time to time deem reasonable, and for that purpose the said company is authorized and empowered to build, lease, purchase, own and use, either directly or through a corporation or corporations organized by it or otherwise for the purpose, and whose stock in whole or in part it shall own, such boats, steamships, vessels, barges and other water craft as in its judgment may be necessary or convenient for its use.

Section 7. Section 8 of said Chapter 326 is hereby amended so as to read as follows: Section 8. The said company shall be capable in law of taking, holding and selling any lands granted to it or to any company whose property it shall acquire by the purchase or otherwise, by the government of the United States, or by this state, or by any state or territory through or in which it shall acquire in any manner and operate any railroad or railroads wherever the said lands may be situated, or by grant by persons, companies, corporations or associations, within or without this state, to aid in the construction or operation of any railroad or railroads by it constructed of otherwise acquired, or authorized to be by it constructed
104 or acquired, and the said company may also pledge, hypothecate, mortgage or otherwise dispose of all its right, title and interest in and to said lands, or any part thereof, and in and to any other estate, real, personal or mixed of which it, the said company, may be seized at the time of the execution of any mortgage or deed of trust, or of which it may become seized subsequent to the execution and delivery of any

such instrument or instruments, including its franchise or to be a corporation and to own, maintain and operate such railroad or railroads; and the said company may sell or lease any of its branch roads however acquired, whenever it shall be declared by resolution of the board of directors, subject to the approval of the holders of record of a majority of the outstanding capital stock, that the interests of the company and its stockholders will be thereby subserved.

Section 8. Section 9 of said Chapter 326 is hereby amended so as to read as follows: Section 9. All of the affairs of said company shall be managed by a board of directors who shall be stockholders, and who are hereby invested with all the powers of the corporation save as hereinafter provided. They shall be chosen annually by ballot by the stockholders at the annual meeting of the company, which shall be held on such notice and at such time, as shall be prescribed by the by-laws, and at such place, within or without the state, as shall
105 be prescribed by the board of directors, and stated in such notice. At all meetings of the stockholders each stockholder shall be entitled to one vote for each share of stock held by him under such conditions and regulations as may be prescribed or referred to in the certificates thereof and may vote the same in person or by proxy duly authorized, and no business shall be transacted at any meeting of the stockholders unless a majority of the stock subscribed and outstanding is represented and outstanding. In all elections of directors those stockholders having the greatest number of votes shall be deemed and declared duly elected. Elections shall be conducted in such manner as shall be prescribed by the by-laws of the company, and if for any cause an election of directors shall not be had at the time when by the provisions of this act or by the by-laws it should be had, the same may be held at any other time, on notice to be given as aforesaid, and until such election be had the directors of the preceding year shall continue to act, until their successors are duly elected and qualified. The company may at any time increase or diminish the number of directors to be elected at the next annual meeting of the stockholders, and the number to be elected shall be specified in the notice of meeting, but shall never be less than five nor more than seventeen; and the said company may by vote of the majority of the stockholders, present or represented at any annual meeting, classify its directors into three classes, each of which shall be composed as nearly as may be
106 of one-third of the directors, the term of office of the first class to expire in one year, of the second in two years, and of the third in three years. At each annual election thereafter a number of directors shall be elected for three years

equal to the number whose term of office shall then expire. All vacancies shall be filled in accordance with the by-laws.

Section 9. Section 10 of said Chapter 326 is hereby amended so as to read as follows: Section 10. A majority of the board of directors shall constitute a quorum for the transaction of business. They shall meet at such times and be convened in such manner as the by-laws shall prescribe, and at such places as the board shall decide upon. Whenever all the members of the board of directors are present at any meeting it shall be competent for them, having signed upon the minutes a waiver of notice of meeting, to transact business as fully to all intents and purposes as if the said meeting had been duly convened pursuant to notice. They shall elect one of their own number to be president, and one to be vice-president, and they may elect additional vice-presidents and such other officers of the board, and impose upon them such duties, and confer upon them such powers as the board may by resolution prescribe. The duties of the president and other officers at meetings of the board and stockholders shall be prescribed by the by-laws. The board of directors shall have power to appoint an executive committee, and to confer upon and to dele
gate to said committee the full power of the board
107 of directors when the latter is not in session;
and the board may appoint a secretary, treasurer, comptroller and such other officers and agents as it may deem necessary, and it may remove them at pleasure, prescribe their duties and compensation, and demand adequate security for the discharge of their respective duties.

Section 10. Section 11 of said Chapter 326 is hereby amended so as to read as follows: Section 11. The capital stock of said company may be increased from time to time to such an amount as may by its stockholders be deemed necessary for the construction, acquisition or operation of any of its railroad or railroads, by a vote of the owners of record of at least a majority of all its outstanding stock, in person or by proxy, at any annual meeting, or at any meeting called for that purpose, by a notice in writing to each stockholder, to be served upon him personally, or by depositing the same in the postoffice, postage paid, properly directed to him at the post-office nearest his usual place of residence, at least twenty days prior to such meeting, such notice shall state the time and place of such meeting, its object, and the amount to which it is proposed to increase such capital stock. No vote in favor of such increase shall take effect until the proceedings of such meeting, showing the names of the stockholders voting therefor, and the amount of stock owned by each, shall be entered upon

the records of said corporation, and the said company may at any time, by a vote of the holders of record of two-
108 thirds of said outstanding stock, classify its said stock into common and preferred; and it may further classify its said stock by dividing its preferred into different classes, and it may make any or all of said classes of preferred stock cumulative or non-cumulative as to dividends thereon, and any or all of said preferred stocks may be with or without preference over any other stock or classes of stock in the event of the liquidation of the company's affairs, either through insolvency or otherwise. And the said company may make such preferred stock convertible into common stock upon such terms and conditions as may be fixed by the board of directors.

Section 11. Section 12 of said Chapter 326 is hereby amended so as to read as follows: Section 12. The said company is hereby expressly authorized to borrow from time to time such sums of money, and upon such terms, as the corporation or board of directors shall agree upon or authorize as necessary and expedient; and in its corporate name to execute and deliver its notes, bonds, debentures or other evidences of indebtedness, in such forms as shall be from time to time prescribed by the board of directors, and in such amount as shall be deemed from time to time by said board, expedient; and may make the same convertible into its capital stock of any class upon such terms and conditions as to the board of directors may seem advisable, and it may pledge or hypothecate such notes, bonds, debentures or other evidences of indebtedness
109 as collateral security for loans made to it by any person or persons, corporation, association or body politic; and it may sell such notes, bonds, debentures or other evidences of indebtedness at such prices and upon such terms as the board of directors shall prescribe; and it may deliver the same in discharge of any liabilities which it may have incurred or proposes to incur, in the construction, purchase or other acquisition of any railroad or railroads or other property which it is or may hereafter be by law authorized to construct, purchase or acquire, and in the repair, equipment or operation of its railroad or railroads, main line or branch, or of any part or parts thereof, or of any steamships, steamboats, barges, ferries or other water craft acquired or owned by it, or which it desires to acquire by construction or purchase; and it may exchange the same for the stocks, bonds or other evidences of indebtedness of any railroad company whose railroad or railroads it is or may hereafter be authorized to purchase and it may generally use the same in such manner as shall in the judgment of the board of directors subserve and promote the cor-

porate purposes; and the powers of said company for the purposes aforesaid, and for all purposes necessary for the carrying out of the objects, or any thereof, of said company are hereby ratified and confirmed; and the said company may, and it is hereby expressly authorized and empowered, in order to secure the payment of any such notes, bonds, debentures or other evidences of indebtedness, execute and deliver
110 from time to time collateral trust, indentures, or other security agreements or indentures, and it may from time to time execute and deliver trust deeds, or mortgages or both, as occasion may require of and upon any of its railroad or railroads, or parts thereof, constructed or thereafter to be constructed or in process of construction and may by any such mortgage or trust deed convey and mortgage all or any of its railroad track or tracks, rights of way, depot grounds, rights, privileges, franchises, immunities, exemptions, machine houses, rolling stock, furniture, tools bridges, elevators steamboats, steamships, and all appendages and appurtenances and all other property, real, personal and mixed, in any manner whatever then belonging to the corporation or which it may thereafter acquire; and it may include in any such mortgage or trust deed any grant or grants of land, or any parts thereof, owned or held by it, or in which it may be or may become interested; and it may also grant, convey and transfer by any such mortgage or deed of trust its franchise to be a corporation and in its franchise to have, possess, maintain and operate the railroad or railroads and other property and operate the railroad or railroads and other property described in any such instrument uncovered thereby; and it may also give and grant to individual bond holders the right and power to vote at meetings of stockholders upon all such questions other than election of directors as may come before such meetings; and every such mortgage, deed of trust, collateral trust,
111 indenture or security agreement to be executed by said company shall be in such form, and contain such provisions, as the corporation or board of directors shall think proper. And in any such mortgage, deed of trust, collateral trust indenture or security agreement there may be inserted provisions limiting the right of individual holders of the bonds, notes or evidences of indebtedness secured thereby to sue or recover upon any such bonds, notes or other evidences of indebtedness, or upon any coupon annexed thereto secured by said instrument either at law or in equity, except through the trustee or trustees to whom or to which or with whom or with which such instrument is made, and every such provision shall be binding upon the holders of said bonds, notes or other evidences of indebtedness, and all thereof, and upon any court

whose jurisdiction and aid may be invoked in foreclosing the lien or liens created thereby. And every such mortgage or mortgages, deed or deeds of trust or collateral trust indenture and every discharge or satisfaction thereof, may be recorded in the office of the secretary of state in a proper book kept for that purpose, and the certificate of such recording endorsed on such instrument, shall have the same effect as if such instrument were recorded in the several counties in which such railroad or railroads may be located and such record in the office of the secretary of state shall be sufficient notice to all persons of the existence and lien created by said instrument, and of the property covered by the same.

112 Section 12. The said company may lease or purchase, and take a conveyance or assignment of the railroad or railroads franchises, immunities, and all other properties and appurtenances and the stocks or bonds, or both thereof, of any other railroad corporation, or any portion thereof within or without this state, when their respective railroads can be lawfully connected and operated together to constitute a continuous line, or when the railroad or railroads so leased or purchased will constitute branches or feeders of any railroad or railroads maintained and operated by such leasing or purchasing company; and the said company may purchase and hold the stock and bonds, or either thereof, of any railway company to which it has furnished the money for the construction of its railway, or may purchase for the money so furnished, or for such other consideration as may be agreed upon between the companies by their respective boards of directors, and take a conveyance of the whole or any portion of the franchises of said corporation, and of the railway property and appurtenances.

Section 13. And the said company may and it is hereby expressly authorized and empowered to, purchase or otherwise acquire and hold the stock or bonds or both thereof of any corporation (wherever organized) the franchises, functions or operations of which may or would in any wise be utilized for the convenient or more economical or safe operation of its railroad or railroads, or of any thereof; and the said com-

113 pany may guarantee the principal or interest or both thereof, of the bonds, or may endorse the same, or may guarantee the dividends upon the stock or the rentals or obligations of any lease or traffic contract of any corporation which it may control by virtue of the ownership of its stock or otherwise, and may endorse the notes of any such company, or other evidences of indebtedness of any such company, and may guarantee by endorsement or otherwise, the bonds or other

evidences of indebtedness, and the dividends upon the stock, or the rentals or obligations of any lease or traffic contract, of any corporation or corporations whose property the said company may now or hereafter be authorized by law to acquire by purchase or lease of the physical property thereof, or by purchase of the stock thereof.

Section 14. The said company shall, in addition to the special powers conferred upon it by said Chapter 326 and by this act, have, possess and enjoy all of the rights, powers, privileges and immunities conferred upon railroad corporations by Chapter 87 of the revised statutes of 1878, and the acts amendatory thereof and supplementary thereto, and shall be subject, save where inconsistent herewith, to the restrictions, duties and liabilities imposed upon railroad corporations by said chapter and all amendatory and supplementary acts.

Section 15. Sections 13, 14, 15, 16, 17, 18 and 19, of said Chapter 326 are hereby repealed.

114 Section 16. All acts and parts of acts inconsistent with or in any manner contravening the provisions of this act are hereby repealed.

Section 17. This act shall take effect and be in force from and after its passage and publication.

T. D. WEEKS,
President of the Senate.

GEO. W. BURROWS,
Speaker of the Assembly.

Approved April 15, 1895. W. H. Upham, Governor.

At a meeting of the stockholders of the Superior and St. Croix Railroad Company, held at the office of John C. Spooner, in the City of Madison, State of Wisconsin, on the 8th day of October, 1895, at ten o'clock A. M., pursuant to adjournment, all of the stockholders being present in person and by proxy, the following resolutions were duly and unanimously adopted, by a stock vote, to-wit:

Resolved, that the action of Hiram Hayes, secretary, in applying for and procuring the amendment to the charter of the company made by Chapter 244 of the laws of 1895, entitled "An act to amend Chapter 326 of the private and local laws of 1870, entitled "An act to incorporate the Superior and St. Croix Railroad Company," and Chapter 328 of the
115 private and local laws of 1871, entitled "An act to amend Section 2, Chapter 326, of the private and local

laws of 1870, approved March 15th, 1870, entitled "An act to incorporate the Superior and St. Croix Railroad Company," be, and the same is hereby ratified and approved.

Resolved, that the president and secretary of the company be, and they are hereby, authorized and instructed to execute on behalf of the company, and under its corporate seal, and to file with the secretary of state, a certified copy of the foregoing resolution accepting said chapter 244 and the amendments to the charter therein and thereby made.

State, County and City of New York—ss.

We, Edward D. Adams, president, and George H. Gardiner, Secretary of the Superior and St. Croix Railroad Company, a corporation organized and existing under the laws of the State of Wisconsin, do hereby jointly and severally certify that we have compared the foregoing with the originals thereof as they appear upon the records of the company, and that the same are true and correct copies of said originals, and of the whole thereof, and that the same were adopted at a meeting of the stockholders of said company duly held as in the caption hereof stated and set forth.

In Witness Whereof, we have hereunto, pursuant to the instructions of the stockholders, as aforesaid, set our hands, and caused the common corporate seal of the company to be hereto affixed.

[Seal]

EDWARD D. ADAMS,
President.

GEORGE H. GARDINER,
Secretary.

116 State of Wisconsin,
Department of State—ss.

Received this 10th day of July, A. D. 1896, and recorded in Vol. 8 of R. R. Inc. & Res. on page 625.

G. E. VANDERCOOK,
Assistant Secretary of State.

At a meeting of the stockholders of the Superior and St. Croix Railroad Company, duly held at the office of Spooner, Sanborn, Kerr & Spooner, in the City of Madison, State of Wisconsin, on the 1st day of July, A. D. 1896, at two o'clock P. M., all of the holders of record of the capital stock of said company being duly represented at said meeting, the following, among other proceedings, were duly had, to-wit:

On motion of Mr. Spooner, seconded by Mr. Reed, the following resolution was, by a stock vote, unanimously adopted,

every share of the outstanding stock of said company voting therefor, to-wit:

Resolved, that the corporate name of this corporation be, and the same is hereby, changed from "The Superior and St. Croix Railroad Company" to "Northern Pacific Railway Company", which latter name is hereby adopted as the corporate name of this corporation.

State, County and City of New York—ss.

I, George H. Gardiner, Secretary of the Superior and
117 St. Croix Railroad Company, and the custodian of its books, records and common corporate seal, do hereby certify that I have compared the above and foregoing with the original resolution, and with the record of its adoption above set forth, and that the same is a true and correct copy of the said resolution, and of the whole thereof, and of the record of the adoption thereof at the meeting of the Stockholders of said Company duly held as in the caption hereof set forth.

In Witness Whereof, I have, pursuant to the order of the stockholders in this behalf, duly made, hereunto set my hands and affixed the said corporate seal this eighth day of July, A. D. 1896.

[Seal] GEORGE H. GARDINER,
Secretary, Superior and St.
Croix Railroad Company.

State of Wisconsin,
Department of State—ss.

Received this 10th day of July and recorded in Vol. 8 of R. R. Inc. & Res. on page 624.

G. E. VANDERCOOK,
Assistant Secretary of State.

United States of America,
The State of Wisconsin, Department of State.

To All to Whom these Presents shall Come,

I, W. L. Houser, Secretary of State of the State of
118 Wisconsin and Keeper of the Great Seal thereof, do hereby certify that the annexed copy of

An Act

To incorporate the Superior and St. Croix Railroad Company and Amendments thereto, including one changing name of the company to Northern Pacific Railway Company, have been compared by me with the enrolled acts and resolutions on file in this Department, and that the same is a true copy thereof, and of the whole of such acts and resolutions.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State at the Capitol, in the City of Madison, this 13th day of July, A. D. 1903.

[Seal]

W. L. HOUSER,
Secretary of State.

Filed in my office at o'clock M., Oct. 19, 1905.
J. P. Johnson, Clerk Dist. Court. By V. A. Dash, Deputy.

119 State of Minnesota,
County of Ramsey—ss.

I hereby certify and return, that at the City of St. Paul, County of Ramsey and State of Minnesota, aforesaid, on the 20th day of October A. D. 1905, I served the Summons hereto attached upon the within named John A. Humbird personally, by handing to and leaving with him, said John A. Humbird, a true and correct copy thereof, and further certify and return that on said date and place I serve the said Summons hereto attached upon the within named Frederick Weyerhaeuser by leaving a true and correct copy thereof at the house of his usual abode with Christ W. Zabee a person of suitable age and discretion then residing therein.

ANTON MIESEN,
Sheriff of Ramsey County, Minn.
By Hans Hanson, Deputy.

Sheriff's Fee Service	$1.50
Travel	.60
	$2.10

Dated this 20th day of October A. D. 1905.

State of Minnesota,
County of St. Louis.

District Court, Eleventh Judical District.

Herbert H. Hoyt,
vs.
John A. Humbird and Federick Weyerhaeuser.

The State of Minnesota, To the above named Defendant.

You are hereby summoned and required to answer the complaint of the Plaintiff in the above entitled action, which is filed in the office of the Clerk of the District Court of
120 the 11th Judical District in and for the County of St. Louis and State of Minnesota and to serve a copy of your answer to the said Complaint on the subscriber, at his

office in Duluth in said County, within 20 days after the service of this summons upon you exclusive of the day of such service; and if you fail to answer this said complaint within the time aforesaid, the Plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated Duluth, Minn., October 19th 1905. H. H. HOYT,
Plaintiff's Attorney,
310 Manhattan Building, Duluth, Minn.

Received Oct. 20, 1905. Anton Miesen, Sheriff.
By Mason, Deputy.

Filed in my office at o'clock m Oct. 26, 1905. J. P. Johnson, Dist. Court, By V. A. Dash, Deputy.

State of Minnesota,
County of St. Louis.

District Court.

Herbert H. Hoyt, Plaintiff,
vs.
John A. Humbird, Frederick Weyerhaeuser, Defendants.

Now come the above named John A. Humbird and Frederick Weyerhaeuser and by their petition respectfully show to the Court:

121 This action was begun by service of the summons and complaint upon the petitioners on October 20, 1905, and is a civil action now pending in this Court.

The petitioners have not yet served or filed their answer in the cause and the time for answering under the laws of Minnesota will not expire until November 9, 1905.

The matter in dispute in this action exceeds the sum of two thousand dollars exclusive of interest and costs, the value of the property in dispute being at least twenty-one hundred dollars.

As appears upon the face of the complaint, this suit involves a federal question. All the plaintiff's rights depend (a) upon the construction of the act of congress of July 2, 1864, granting land to aid in the construction of a railroad from Lake Superior to Puget Sound and the amendments of that act, among others the joint resolution of congress of May 31, 1870, pertaining to the indemnity under said grant, and (b) upon the interpretation and effect to be given to the act of congress of July 1, 1898, also relating to the said land. As appears from the face of the complaint, the decision of the case must turn upon the effect and interpretation of the said acts of congress.

The defendants herewith offer and file a bond as provided by the laws of the United States upon the removal of causes from the State Court to the United States Court, which bond is hereto attached and submitted to the Court.

Wherefore your petitioner pray this honorable court to accept the said bond and that said cause be removed into the circuit court of the United States for the District of Minnesota, and that this court proceed no farther in the premises.

122 Dated November, 4, 1905.

JOHN A. HUMBIRD,
FREDERICK WEYERHAEUSER,
By C. W. Bunn, Defendants' Attorney.

Post Office Address, Northern Pacific General Office Building, corner Fourth & Broadway Streets, St. Paul, Minnesota.

State of Minnesota,
Ramsey County—ss.

Fred E. Weyerhaeuser being duly sworn deposes and says that he is agent of the petitioners named in the foregoing petition and knows the contents thereof and is authorized by the petitioners to make this petition and affidavit; that the petition is true to his own knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it [it] to be true, that as to the value of said property his belief is based upon careful estimates and examinations of the land itself by agents of the defendants, and he verifies this petition because both the petitioners are absent from the state of Minnesota where deponent resides.

FRED E. WEYERHAEUSER.

Subscribed and sworn to before me the 6th day of November, 1905.

W. T. FRANCIS.
Notary Public, Ramsey County, Minnesota.
My Commission expires April 5th, 1911.
[Notarial Seal]

State of Minnesota,
County of St. Louis.

District Court.

123 Herbert H. Hoyt, Plaintiff,
vs.
John A. Humbird, Frederick Weyerhaeuser, Defendants.

Know All Men By These Presents that we, John A. Humbird, and Frederick Weyerhaeuser, of Saint Paul, Minnesota, as

principals, and A. R. Macartney of St. Paul as surety, are held and firmly bound unto Herbert H. Hoyt, the plaintiff in the above entitled suit, in the penal sum of five hundred dollars lawful money of the United States, for the payment of which well and truly to be made the said principals bind themselves, their heirs, executors, administrators and assigns, and the said surety binds himself, his heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated on the Sixth day of November, A. D. 1905.

The condition of the above obligation is such that if said John A. Humbird and Frederick Weyerhaeuser, the defendants in an action now pending in the District Court of St. Louis County, Minnesota, shall enter in the Circuit Court of the United States, for the District of Minnesota, on the first day of next session thereof, a copy of the records in said suit, and shall pay all costs that may be awarded by the said Circuit Court, if said Court shall hold that such suit was wrongfully or improperly removed thereto, and shall also then appear and enter special bail in said suit, if special bail was originally requisite therein, and shall enter appearance of said
124 defendants in said Court, then this obligation to be void, otherwise to remain in full force and effect.

In witness whereof the said obligors have hereunto set their names and seals this 6th day of November A. D. 1905.

JOHN A. HUMBIRD, [Seal]
By C. W. Bunn, his Atty.

FREDERICK WEYERHAEUSER [Seal]
By C. W. Bunn, his Atty.

A. E. MACARTNEY [Seal]

State of Minnesota,
Ramsey County—ss.

A. E. Macartney came before me personally and being by me first duly sworn deposes and says that he is the person named as surety in the foregoing bond; that he is a resident and free holder of and within the State of Minnesota and worth the amount of Five Hundred Dollars specified in the foregoing bond above his debts and liabilities and exclusive of his property which is exempt from execution.

A. E. MACARTNEY.

Subscribed and sworn to before me the 6th day of November 1905.

W. T. FRANCIS,
Notary Public, Ramsey County, Minnesota.
My commission expires April 5th, 1911.
[Notarial Seal]

Filed in my office at o'clock m Nov. 7, 1905. J. P. Johnson, Clk. Dist. Court. By V. A. Dash, Deputy.

State of Minnesota,
County of St. Louis.
District Court.

Herbert H. Hoyt, Plaintiff,
vs.
John A. Humbird, Frederick Weyerhaeuser, Defendants.

Upon the filing and presentation to the Court of the
125 petition of John A. Humbird and Frederick Weyerhaeuser to remove this suit to the Circuit Court of the United States, District of Minnesota, together with their bond in accordance with law,

It is hereby ordered that the said petition and bond be accepted and that this Court proceed no further with the cause. Dated November 7, 1905.

HOMER B. DIBELL, Judge.

Filed in my office at o'clock m Nov. 7, 1905. J. P. Johnson, Clk. Dist. Court. By V. A. Dash, Deputy.

Clerk's Certificate.

State of Minnesota,
County of St. Louis—ss.

District Court, Eleventh Judicial District.

I, J. P. Johnson, Clerk of the District Court, St. Louis County, and State of Minnesota, do hereby certify that I have compared the foregoing papers writing with the original Complaint, Summons and return; Petition and Bond on Removal to United States Circuit Court; and Order on Removal to United States Circuit Court in the action therein entitled, now remaining of record in my office, and that the same is a true and
126 correct copy and transcript of said original papers and the whole thereof.

Witness my hand and seal of said court, at Duluth, the 7th day of November A. D., 1905.

J. P. JOHNSON, Clerk.
By H. C. Wedmark, Deputy Clerk.

Endorsed: Transcript from St. Louis County State Court. Filed Nov. 8th, 1905. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

127 That on the 9th day of November, A. D. 1905, the appearance by H. Oldenburg, Esq., as solicitor for defendants, was filed and entered.

That further on the same day, to-wit: on the 9th day of November, A. D. 1905, there was filed with said Clerk a stipulation extending the time in which defendants may answer; and that on the same day there was entered in the Term Minutes of said Court an Order of Court permitting such extension; which said stipulation and order are, in words and figures, as follows, to-wit:

Herbert H. Hoyt,

No. 497. vs. In Equity.

John A. Humbird and Frederick Weyerhaeuser.

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the time to plead, answer or demur to the complaint in the above entitled cause be and is hereby extended to and including the first Monday in January, 1906.

H. H. HOYT,
Counsel for Plaintiff.

C. W. BUNN and
JAMES B. KERR,
Counsel for defendants.

Pursuant to the foregoing stipulation filed this day herein, it is now, by the Court

Ordered: That the time in which the defendants may plead, answer or demur to the complaint herein be, and the same hereby is extended to and including the first Monday in January A. D. 1906.

That on the 5th day of December, A. D. 1905, there
128 was filed with said Clerk the Answer of the defendants in said cause; in the words and figures following, to-wit:

Circuit Court of the United States, for the District of Minnesota, Fifth Division.

Herbert H. Hoyt, Complainant,

vs.

John A. Humbird and Frederick Weyerhaeuser, Defendants.

Answer.

Come now the defendants John A. Humbird and Frederick Weyerhaeuser and answer the complaint herein as follows:

I.

Defendants admit that the land described in the bill of complaint was and is chiefly valuable for the timber
129 standing thereon and has no valuable deposit of gold, silver, cinnabar, copper or coal, and was at the times mentioned in the bill of complaint and now is uninhabited, in

a state of nature and unimproved, but defendants say that the land is susceptible of and fit for cultivation when cleared of the timber thereon.

II.

Defendants admit that on or about December 17, 1898, one Richard B. Jones applied to the United States District Land Office at Duluth to purchase the land in question under the provisions of the act of congress of June 3, 1878, and that notice of such application was posted and published as required by law, and that Exhibit "A" attached to the bill of complaint is a copy of the evidence presented to said district land officers. Defendants admit that said Jones paid to the receiver of said district land office the sum of one hundred dollars and received a receipt therefor in the form set out in the bill of complaint.

Defendants allege that at the time of the application by Richard B. Jones and at the time of the issuance of said receipt the land in question was not subject to entry or purchase under the act of congress of June 3, 1878, but was reserved and appropriated by the selection thereof by the Northern Pacific Railroad Company, as hereinafter more fully set forth, and the register and receiver of said district land office had no jurisdiction or authority to receive said application or to issue said receipt.

Defendants have no knowledge or information sufficient to form a belief as to whether said Jones attempted to convey said land to Minnie Stewart or whether said Minnie Stewart attempted to convey it to complainant, but defendants allege that neither Jones, Stewart nor complainant ever acquired
130 any title to or interest in the land whatsoever.

Defendants admit that on December 2, 1901, the Commissioner of the General Land Office rendered the decision, bearing that date, cancelling said entry of Richard B. Jones, set out in the bill of complaint, but the defendants deny that said decision and order cancelling said entry was rendered without notice to Jones and those claiming under him, or without any hearing or evidence, and the defendants allege that Jones and those claiming under him received due and sufficient notice and that the action of the Commissioner of the General Land Office was had after such notice and a full hearing and upon a due consideration of all the facts bearing upon the validity of said entry. Defendants deny that the order of the Commissioner of the General Land Office cancelling said entry was made without jurisdiction or was void, and defendants allege that said order was properly made and

was required by reason of the erroneous allowance of said entry by the district land officers.

Defendants admit that an appeal was duly taken from said decision of December 2, 1901, to the Secretary of the Interior, and that said decision was affirmed on August 30, 1905, by the Secretary, and that Exhibit "B" attached to the bill of complaint is a true copy of such decision of affirmance.

Defendants admit that a patent for the land in question was thereafter issued by the United States, and defendants allege that said patent was duly executed on the 18th day of October, 1905.

Defendants admit that at the time of the issuance of said patent the Northern Pacific Railway Company had knowledge of the pretended entry of Richard B. Jones, but defendants deny that said Railway Company had any knowledge or notice of plaintiff's claim thereunder.

131 III.

Defendants admit that the land in question is situated outside the limits of the grant by act of congress approved July 2, 1864, but within the extended indemnity limits of said grant created by the joint resolution of congress approved May 31, 1870. Defendants deny that the selection of the land in question as indemnity was illegal.

Defendants Admit that the land in question was selected with other land in lieu of the north half of the southeast quarter of section eleven of township forty-six north, of range sixteen west, in the State of Minnesota, and admit that the land last described was within the over-lapping limits of the grant to the State of Minnesota by act of congress of May 5, 1864, to aid in the construction of a railroad from St. Paul to Lake Superior, of which the Lake Superior & Mississippi Railroad Company became the beneficiary. Defendants admit that the land so specified as a basis for the selection of the land in controversy was approved to the Lake Superior & Mississippi Railroad Company as indemnity under said grant of May 5, 1864, on April 25, 1868, and was outside the withdrawal of May 26, 1864, for the benefit of the Lake Superior & Mississippi Railroad Company. Defendants deny that said land so specified as a basis for the selection of the land in controversy was outside the limits of the grant of May 5, 1864, and deny that it was within the limits of the extension of said grant by act of congress approved July 13, 1866, and allege that it was within the ten-twenty mile or indemnity limits created by the act of May 5, 1864, as defined by the definite

location of the railroad of the Lake Superior & Mississippi Railroad Company.

IV.

Defendants deny that any line of the Northern Pacific railroad was ever located or constructed under the act of congress of July 2, 1864, between Thompson Junction and
132 Duluth, and no lands were ever claimed by the Northern Pacific Railroad Company under any grant by the United States by virtue of said line of road between Thomson Junction and Duluth, and defendants allege that the Northern Pacific Railroad Company merely acquired from the Lake Superior & Mississippi Railroad Company a half interest in said line under authority granted by and for the purpose of complying with certain requirements imposed by the State of Minnesota.

V.

Defendants deny that any requirements of law or of the Interior Department in the selection of the lands in question were omitted by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company.

VI.

Defendants deny that the Northern Pacific Railroad Company, before the issuance of the patent for the land in question, had received more land under its said grant than it was entitled to receive upon the side of the road in which said land was situated, or at all.

VII.

Defendants admit that on November 13, 1895, the Secretary of the Interior rendered a decision declaring that the eastern terminus of the Northern Pacific railroad, under the act of congress of July 2, 1864, was not farther east than Superior, and on August 27, 1896, the Secretary of the Interior rendered another decision wherein he held that the eastern terminus of said grant, under the act of July 2, 1864, was at Duluth, and on December 24, 1896, the land department prepared a diagram showing the eastern terminus of said grant
133 as so defined by the Secretary's decision of August 26, 1896, and a copy thereof was transmitted to the Duluth Land Office on January 22, 1897.

Defendants admit that on July 17, 1897, the Commissioner of the General Land Office addressed a communication bearing that date to the register and receiver of the Duluth land office, of which a copy is set out in the bill of complaint. Defendants admit that the notice required by said communication was

given as directed. Defendants allege that said decisions of the Secretary of the Interior of November 13, 1895, and August 27, 1895, and the directions contained in the communication of July 17, 1897, were erroneous and were rendered and given under a mistake of law as to the true eastern terminus of said land grant, which was and is in fact at Ashland in the State of Wisconsin, and neither by virtue of said mistaken directions of the Commissioner of the Land Office, nor otherwise, was any action required by the Northern Pacific Railroad Company to protect or enforce its rights to the land in question.

Defendants deny that the aforesaid action of the Interior Department restored the land in question to the public domain, and these defendants allege that at all the times mentioned in the bill of complaint the land was appropriated for the benefit of the Northern Pacific Railroad Company by virtue of its selection thereof as indemnity.

Defendants admit that on July 12, 1900, under the direction of the Secretary of the Interior the Commissioner of the General Land Office rescinded the previous action of the land department and declared the selection of the lands in question reinstated.

Defendants admit that on February 28, 1898, an order
134 was made by the land department of which an extract is correctly copied in the bill of complaint.

Defendants admit that instructions were issued to the Duluth land office on April 4, 1898, as set forth in the bill of complaint.

VIII.

Defendants admit that instructions were issued by the Interior Department on February 14, 1899, regarding the adjustment of the Northern Pacific land grant under the provisions of the act of congress of July 1, 1898, as set forth in the bill of complaint, but except where the said bill of complaint purports to copy verbatim the provisions of said instructions defendants beg leave to refer to the published instructions for the text thereof.

Defendants admit that the Interior Department found and held by its published regulations dated November 21, 1899, that the Northern Pacific Railway Company was the lawful successor in interest of the Northern Pacific Railroad Company as to all lands within the grant to the last named company, and these defendants allege that said said finding by the Interior Department as to such successorship was based upon the good

and sufficient evidence and is final and conclusive. Defendants deny that the Northern Pacific Railway Company is not such successor and allege that it is in fact such successor.

IX.

Defendants admit that their claim of title to the land in question is derived from the Northern Pacific Railway Company. Defendants deny that the patent for said land issued by the United States to the Northern Pacific Railway Company was issued under a mistake of law or without authority. Defendants admit that the lands in question and the right to receive a patent therefor from the United States passed

135 from the Northern Pacific Railroad Company by a sale held in pursuance of a decree of the Circuit Court of the United States for the Eastern District of Wisconsin rendered upon the supplemental bill of The Farmers' Loan and Trust Company in a certain consolidated cause entitled The Farmers' Loan and Trust Company versus Northern Pacific Railroad Company and others, defendants, and in pursuance of a similar ancillary decree entered in the Circuit Court of the United States for the District of Minnesota in an ancillary proceeding prosecuted therein under the same title, and that the portion of the decree or order of June 5, 1899, set out in the bill of complaint is correctly stated.

Defendants deny that the Court was without authority to make the order of sale under which the Northern Pacific Railway Company purchased said land, but defendants allege that the Circuit Court of the United States for the Eastern District of Wisconsin and the Circuit Court of the United States for the District of Minnesota had jurisdiction of all the parties and of the subject matter in said cause and full power and authority to make and enter said order and decree of sale.

Defendants admit that in pursuance of said decree Alfred L. Cary, Special Master named therein, executed the same and reported to the Court that he had sold to the Northern Pacific Railway Company the lands, rights and titles as alleged in the bill of complaint.

Defendants admit that on September 22, 1899, the said Alfred L. Cary, as Secial Master by deed dated that day, conveyed to the Northern Pacific Railway Company the property so sold as aforesaid, including the land in question, and that said deed contains a recital quoted in the bill of complaint.

136 Defendants deny that at the time of the sale to the Northern Pacific Railway Company, the Northern

Pacific Railroad Company had no interest upon which such sale could attach.

X.

Defendants deny that the Northern Pacific Railway Company had no power or authority to purchase the land in question and the right thereto, and they deny that the patent of the United States therefor was issued without authority or under a mistake of law or fact.

Defendants deny that the Northern Pacific Railway Company is the successor of the "Superior and St. Croix Railroad Company" and defendants allege that the name "Superior and St. Croix Railroad Company" has merely been changed to "Northern Pacific Railway Company."

Defendants deny that the legislature of Wisconsin did not grant to the Northern Pacific Railway Company any authority to hold or possess lands other than such as might be required for the operation of its railroad. Defendants admit that Exhibit "D" attached to the bill of complaint contains true copies of the act to incorporate the Superior and St. Croix Railroad Company, and of certain acts amendatory thereof and supplemental thereto, and of the record of certain proceedings taken to change the name of the Superior and St. Croix Railroad Company to Northern Pacific Railway Company.

XI.

Further answering, defendants allege that they are the owners of the land described in the bill of complaint herein. Defendants allege that said land is situated more then thirty and less than forty miles distant from the line of the Northern Pacific Railroad as said line was definitely located under the acts of congress approved July 2, 1864, and the acts amendatory thereof granting lands to the Northern Pacific
137 Railroad Company to aid in the construction of a line of railroad from Lake Superior to Puget Sound and within the idemnity limits provided by the joint resolution of congress approved May 31, 1870, amendatory of the act of July 2, 1864; that said land was duly selected under the terms of said joint resolution by the Northern Pacific Railroad Company, and in pursuance of such selection was thereafter patented by the United States to the Northern Pacific Railway Company, which last named company was then the successor in interest of the Northern Pacific Railroad Company, on October 18, 1905; that on January 19, 1900, the said Northern Pacific Railway Company executed and delivered to defendants its deed of conveyance, purporting to convey said land, which deed contained full covenants on behalf of said Railway Com-

pany that it was seized of said land and had good right and lawful authority to convey the same, and these defendants say that they have elected to take and receive, by virtue of said covenants, and have thereby become vested with the full title to said land under and through the Northern Pacific Railway Company.

Defendants deny every matter and thing in said bill of complaint contained not hereinbefore expressly admitted.

Wherefore, defendants pray that the bill of complaint herein be dismissed with costs in favor of these defendants.

JOHN A. HUMBIRD and
FREDERICK WEYERHAEUSER,
By C. W. Bunn and James B. Kerr,
Their Solicitors.

138 United States of America,
District of Minnesota,
County of Ramsey—ss.

John A. Humbird, being first duly sworn on oath says: That he is one of the defendants above named and makes this affidavit on behalf of his co-defendant and himself; that he has read the foregoing answer and knows the contents thereof and that the same is true.

JOHN A. HUMBIRD.

Subscribed and sworn to before me this 4th day of December, A. D. 1905.

[Notarial Seal] A. E. McCARTNEY,
Notary Public, Ramsey County, Minnesota.
My Commission expires May 25, 1907.

Endorsed: Answer. Filed Dec. 5, 1905. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk.

That on the 8th day of December, A. D. 1905, there was filed with said Clerk separate Replications to the Answer of the defendants in said cause; in the words and figures following, to-wit:

United States Circuit Court, District of Minnesota,
Fifth Division.

Herbert H. Hoyt, Complainant,
vs.
John A. Humbird and Frederick Weyerhaeuser,
Defendants.

139 This replicant, saving and reserving to himself, now and at all times hereafter, all, and all manner of ad-

vantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant Frederick Weyerhaeuser for replication thereunto, says that he will aver, maintain and prove his bill of complaint to be true, certain and sufficient in the law to be answered unto; and that the answer of the said defendant is uncertain, untrue and insufficient, to be replied unto by this replicant without this, that any other matter or thing whatsoever in answer contained, material or effective in law to be replied unto, confessed and avoided, traversed, or denied, is true; all which matters and things this replicant is and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by his bill he has always prayed.

H. H. HOYT,
Counsel & Solicitor for Complainant.

To: C. W. Bunn and James B. KERR,
Counsel & Solicitors for Defendant.

Endorsed: Reply to Answer of Defendant, Weyerhaeuser. Filed Dec. 8, 1905. Henry D. Lang, Clerk, by Thos. H. Pressnell, Deputy Clerk.

United States Circuit Court, District of Minnesota, Fifth Division.

Herbert H. Hoyt, Complainant,
vs.
140 John A. Humbird and Frederick Weyerhaeuser, Defendants.

This replicant, saying and reserving to himself, now and at all times hereafter, all, and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant John A. Humbird, for replication thereunto says that he will aver, maintain and prove his bill of complaint to be true, certain and sufficient in the law to be answered unto; and that the answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this replicant without this, that any other matter or thing whatsoever in answer contained, material or effective in law to be replied unto, confessed, and avoided, traversed, or denied, is true; all which matters and things this replicant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he has always prayed.

H. H. HOYT,
Counsel & Solicitor for Complainant.

To: C. W. Bunn, and James B. Kerr,
Counsel & Solicitors for Defendants.

Endorsed: Reply to Answer of Defendant Humbird. Filed Dec. 8, 1906. Henry D. Lang, Clerk, by Thos. H. Pressnell, Deputy Clerk.

141 That on the 24th day of December, A. D. 1906, there was filed with said Clerk, a notice of trial and note of issue in said cause; and that in compliance with the request in said note of issue contained said clerk duly placed said cause on the trial calendar for the January, A. D. 1907, term of said Court, for final hearing.

That on the 13th day of February, A. D. 1907, said cause was, by order of the Court, consolidated with the cause entitled Charles D. Campbell vs. Frederick Weyerhaeuser and John A. Humbird for the purpose of final hearing, in the words and figures following, to-wit:

Herbert H. Hoyt,
No. 497. vs. In Equity.
Frederick Weyerhaeuser and John A. Humbird,

and

Charles D. Campbell,
No. 507. vs. In Equity.
Frederick Weyerhaeuser and John A. Humbird.

Upon the motion of H. H. Hoyt, Esq., solicitor for complainant, solicitor for defendants consenting thereto, it is by the Court

Ordered: That said causes be, and they hereby are consolidated for the purposes of the final hearing thereof, and that they be tried as one and the same cause.

And it is by the Court further

Ordered: That the final hearing of said consolidated cause be, and the same hereby is set for Monday, March 4th, A. D. 1907 at ten o'clock A. M.

142 That said consolidated causes came on for final hearing on the 4th day of March A. D. 1907, and said hearing was concluded on the following day, to-wit: on the 5th day of March, A. D. 1907, and proceedings were had therein, as recorded in the Term Minutes of said Court, as follows, to-wit:

Herbert H. Hoyt,
No. 497. vs. In Equity.
Frederick Weyerhaeuser and John A. Humbird,

and

Charles D. Campbell,
No. 507. vs. In Equity.
Frederick Weyerhaeser and John A. Humbird.

The above entitled causes having heretofore been consolidated for the purpose of final hearing, coming on for hearing at this time, H. H. Hoyt, Esq., appears on his own behalf in the case of Herbert H. Hoyt vs. Frederick Weyerhaeuser, et al and as solicitor for complainant in the case of Charles D. Campbell vs. Frederick Weyerhaeuser, et al, and Messrs. C. W. Bunn and M. T. Saunders appear as solicitors for the defendants in both of said causes; Mr. Hoyt opens and argues the first cause on his own behalf and Mr. C. W. Bunn opens and concludes his argument therein on behalf of the defendants.

And said arguments not being concluded at the hour of adjournment it is by the Court

Ordered: That further proceedings herein be and the same hereby are postponed and continued until tomorrow morning at ten o'clock.

143

March 5, 1907.

This day come again the parties to said consolidated cause, by their respective solicitors, and further proceedings are had therein as follows, to-wit:

H. H. Hoyt, Esq., solicitor on his own behalf closes his argument in said first cause.

C. W. Bunn, Esq., closes on behalf of the defendants.

H. H. Hoyt, Esq., opens and concludes his argument on behalf of complainant in said second cause.

C. W. Bunn, Esq., opens and concludes his argument on behalf of the defendants.

And the Court having heard the evidence and the arguments and statements of the respective counsel of all the parties to said causes, being fully informed in the premises takes the same under advisement.

That the evidence submitted in said cause No. 476, at the final hearing hereof is as follows, to-wit:

United States Circuit Court, District of Minnesota, Fifth Division.

Herbert H. Hoyt, Complainant,
No. 497. vs.
John A. Humbird and Frederick Weyerhaeuser, Defendants.

Deposition taken before Thomas H. Pressnell, General Examiner in Chancery, by order of the Court, dated
144 April 21, 1906, together with the exhibits offered in connection therewith.

July 3, 1906.

Appearances.

For complainant, H. H. Hoyt, attorney at law.

Grafton Mason and M. T. Sanders, Attorneys for defendant

Documentary Evidence and Deposition of J. J. Durage.

Mr. Hoyt:
Complainant's Exhibit "E" offered in evidence, being an exemplified copy of the Joint Resolutions offered in the Senate of the United States, April 8, 1896, by Senator Mitchell.

Mr. Sanders:
Objected to as incompetent, irrelevant and immaterial.

Mr. Hoyt:
And this also includes report from Mitchell of April 21, 1896, and an amendment made May 16, 1896, and an amendment made May 25th, 1896, and another amendment made June 5th, 1896, and another proposed amendment by Senator Smith, June 6th, 1896.

Mr. Sanders:
Objected to as incompetent, irrelevant and immaterial, and not admissible under the pleadings.

Mr. Hoyt:
Complainant's Exhibit "F" offered in evidence, being an exemplified copy of report from the Committee of the Senate of the United States, dated April 21, 1896, by Senator
145 Mitchell, of Oregon, Committee on the Judiciary.

Mr. Sanders:
Objected to as incompetent, irrelevant and immaterial, and not admissible under the pleadings.

Mr. Hoyt:
Complainant's Exhibit "G" offered in evidence, being extract from the Journal of the Senate of the United States of the Fifty-Fourth Congress, First Session, dated April 8, 1896, pages 228 and 229.

Mr. Sanders:
Objected to as incompetent, irrelevant and immaterial.

Mr. Hoyt:

Complainant's Exhibit "H" offered in evidence, being diagram prepared to show the withdrawal on General Route for the Lake Superior and Mississippi Railroad by letter of May 26th, 1864, on map filed May 7th, 1864, attached to which is a Certificate as follows:

"Department of the Interior, General Land Office, Washington, D. C., May 29th, 1901.

"I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy of the diagram, prepared by this office, to show the limits of the withdrawal made May 26th, 1864, on the map of the General Route, filed May 7th, 1864, by the Lake Superior and Mississippi Railroad Company, is a true and literal exemplification of the original now on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[Signed] BINGER HERMANN,
Commissioner of the General Land Office."

Mr. Sanders:

Objected to as incompetent, irrelevant and immaterial.

Mr. Hoyt:

Complainant's Exhibit "I" offered in evidence, being
146 map the same as Exhibit "H", to which is attached the following certificate:

"Department of the Interior, General Land Office, Washington, D. C., June 14th, 1906.

"I hereby certify that the annexed copy of so much as is shown thereon of the official diagram, showing the limits of the grant to the Northern Pacific Railroad Company, is a true and literal exemplification of the original diagram on file in this office.

"In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed at the City of Washington, on the day and year above written.

[Signed] G. T. POLLOCK,
Acting Commissioner of the General Land Office."

Mr. Sanders:

Objected to as incompetent, irrelevant and immaterial.

J. J. Durrage, called as a witness on behalf of complainant, being first duly sworn, testifies as follows:

518

Direct Examination.

By Mr. Hoyt:

Q. Where do you reside? A. Duluth, Minnesota.

Q. How long have you resided here? A. Twenty Years.

Q. What is your occupation? A. Civil Engineer.

Q. Have you, in your business, been in the habit of drawing maps and diagrams, and land [plate], and so forth?

A. Yes, Sir.

Q. Did you draw this map, Exhibit "J"?

Mr. Sanders:

Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir.

147 Mr. Hoyt:

Q. What does that map show?

Mr. Sanders: Objected to as incompetent, irrelevant and immaterial.

A. It is a compilation of maps issued by the land department of the United States—(Witness is shown Exhibit "J") "H" and "I"—It is a compilation of Exhibits "H" and "I".

Mr. Hoyt:

Q. Will you go on and explain this map as to the different lines in reference to it?

Mr. Sanders: Objected to as incompetent, irrelevant and immaterial. Also object to witness reading his testimony from a typewritten document.

Mr. Hoyt: That is simply a memorandum.

A. The line in dash and ring indicates the Lake Superior & Mississippi Railroad general route, withdrawal May 26, 1864.

Q. When you say dash and ring, explain in your testimony, so that they will understand in your testimony what it is?

A. Dash, ring; dash ring; dash ring; dash ring; dash ring. Full lines marked with tie shading, designate the lines as finally adopted by the Lake Superior & Mississippi Railroad and the Northern Pacific Railroad. Full heavy lines—

Q. What's the color of the full heavy—

A. Full heavy lines, pink lines, designate the general route of the Northern Pacific Railroad. Lines shaded in yellow, designate the place limits, and the outside limits of the General Route of the Lake Superior & Mississippi Railroad, filed May 7th, 1864. The lines shown in purple designate the

148 10, 20 and 30 mile limits of the definite location of the Lake Superior & Mississippi Railroad. The lines shaded in green designate the 20, 30 and 40 mile limits of the Northern Pacific Railroad; in each side of the central line,

each side of definite location. Diagram in red, full red lines, show the limits, twenty-five mile tangents, beginning at a point "A" Bluff Creek, Superior, and exhibiting from that point three tangents, "AB", "BC", and "CD", the lineage being based upon co-ordinates, constructed at right angles to these tangents. Line AF and line EB show a parallel system between both of the roads, and the parallel lines, AF, LM and BE HG, show the respective 20, 30 and 40 mile limits, and also the area covered by both.

Q. Both what?

A. By both lines, AF and DE is parallel.

Q. Captain, in this map you show the place limits, and the 10 and 20 mile limits of the Northern Pacific Railroad Company, as far as this map shows? A. Yes, sir.

Q. And you also show the general route, and the definite location of the Lake Superior & Mississippi Railroad Company in the State of Minnesota, with these limits, 10, 20 and 30 mile limits?

A. That is exactly correct, sir.

Q. By these shaded lines, in accordance with your opinion, the map is correct, showing both of these lines of the Northern Pacific and the Lake Superior & Mississippi road?

Mr. Sanders: Objected to as incompetent, irrelevant and immaterial.

A. You are perfectly correct.

Mr. Hoyt:

149 Q. Is that memorandum something that you made?

A. Yes, sir.

Q. I wish you would read and have the stenographer take it down.

Mr. Sanders: Objected as incompetent, irrelevant and immaterial.

Witness reads:

"Line marked in dash and ring is the general route of the Lake Lake Superior & Mississippi Railroad withdrawn May 26th, 1864.

Full lines with tie shading show the tracks of the Lake Superior and Mississippi and the Northern Pacific Railroads.

Full heavy lines on sectional lines show the original and amended limits of the Northern Pacific Railroad.

Lines shaded in yellow show the ten mile and outside limits, respectively, of the general route of the Lake Superior and Mississippi Railroad shown on the map filed May 7, 1864.

Lines marked in purple show the 10, 20 and 30 mile limits, respectively, of the Lake Superior and Mississippi Railroad.

Red lines "AB", "BC" and "CD" show tangents on the line of the line of the Northern Pacific projected on the 25 mile principle and the lines 1, 2, 3, 4, 5—6, 7, 8, 9, 10 show respectively the 40 mile limits of the Northern Pacific Railroad. Similar and parallel lines also in red show the 30 and 20 mile limits. The whole system is based on right angled ordinates to the tangents AB, BC, CD.

Line BE shows a tangent of the Lake Superior and Mississippi Railroad in parallel to tangent AF of the Northern Pacific in route A. F. B. C. D.

The rectangles A F G F C and E B L M show respectively the 40 mile limits constructed upon the tangents E. B. and A. F. The rectangle L.N.B.A. shows the area common to the limits of the tangents AF and EB.

Cross Examination,

By Mr. Sanders:

Q. Captain, you say that this map is a compilation?

A. Yes, sir.

Q. From what?

A. From records duly testified to in the possession of Mr. Hoyt.

150 Q. Certified?

A. Duly certified by the Land Department.

Q. Exactly. From what records is this map compiled?

A. Those exhibits here.

Q. From Exhibits H. and "I"?

A. Yes, sir.

Q. Is all the information shown on this map contained in Exhibits "H" and "I"? A. No, sir.

Q. The parallelograms shown on this map are not in Exhibits "H" and "I" are they?

A. No, that one isn't, from C to D.

Mr. Hoyt:

Q. You put those parallelograms on map yourself, it is your work? A. Yes, sir.

Mr. Sanders:

Q. Then all the parallelograms on this map are your work?

A. Yes, sir; they are in—

Q. They are not in fact taken from Exhibits "H" and "I", are they? A. Well, they are taken—part of them.

Q. Well, are they? A. Yes, sir.

Q. Then they are not taken from these exhibits?

A. No, not those lines are not. These parallelograms are my own work.

Mr. Sanders: Move to strike out all the testimony of this witness.

Mr. Hoyt: Exhibit J. offered in evidence—

Objected to as incompetent, irrelevant and immaterial.

151 Mr. Hoyt:

Complainant's Exhibit "K" offered in evidence, being the resolutions from the Northern Pacific Railroad Company Board of Directors, July 13, 1898 (exemplified copy) in reference to the acceptance of the railroad company with the Act of Congress Sundry Civil appropriation bill, approved July 1, 1898.

Complainant also offers in evidence Exhibit "L", being exemplified copy of the Northern Pacific Railroad Company's communication to the Secretary of the Interior, July 3, 1882, the filing of the map of the definite location of the Northern Pacific Railroad Company from a point on the main line at its junction with the St. Paul and Duluth Railroad near the right bank of the St. Louis River, in the State of Minnesota, thence in an easterly direction to a point in Section 15, Township 47 North, Range 2 West of the Fourth Principal Meridian, in the State of Wisconsin, filed July 6, 1882.

Complainant also offers in evidence Exhibit "M" being [and] exemplified copy from the Commissioner of the General Land Office, dated May 26th, 1864, to the Register and Receiver at Duluth, Minnesota; the order of withdrawal of the land from the sale or location, pre-emption or homestead settlement in aid of the construction of the Railroad from St. Paul to Lake Superior, and also the other withdrawal dated November 2, 1866, by the Commissioner of the General Land Office to the Register and Receiver at Duluth, Minnesota, order withdrawal for the benefit of the Lake Superior & Mis-

152 sissippi Railroad Company.

Mr. Sanders:

Objected to as incompetent, irrelevant and immaterial.

Mr. Hoyt:

Complainant offers in evidence Exhibit "N", being so much of list No. 2, of the land approved for the Lake Superior & Mississippi Railroad Company, March 26, 1868, and shows that all of Section 11, Township 46 North of Range 16, West, between the 10 and 20 mile limits of the Lake Superior and Mississippi Railroad in the Duluth Land District, is approved March 25th, 1868.

"Said list of lands in the district of lands, subject to sale at Duluth, Minnesota, outside of the ten and within the twenty mile limits of the reserve to satisfy the grant made to the State of Minnesota, by the Act of Congress approved May 5, 1864, bing an act granting public lands in alternate sections to the State of Minnesota to aid in the construction of the Lake Superior & Mississippi Railroad, being the land selected by the agent of the Governor of the State of Minnesota from the lands of the United States in alternate sections and parts of sections, designated by odd numbers, nearest to the tiers of sections within ten sections in width on each side of the railroad, from the City of St. Paul to the head of Lake Superior, and in lieu of the lands in the alternate sections designated by odd numbers within said ten sections in width, which the United States had legally sold or otherwise appropriated or to which the rights of pre-emption have attached.

Indemnity List No. 2 Approved March 25, 1868.

Copy sent to Governor May 27th, 1868.

Copy sent to local officers May 27th, 1868.

Approval noted on tract books May 29, 1868.

Certificate attached:

"General Land Office, March 20, 1868.

"I, Joseph S. Wilson, Commissioner of the General Land Office, do hereby certify that the foregoing on pages one and two, inclusive, is a true and correct list of the tracts of land selected by the agent of the State of Minnesota, outside of the Ten and within the Twenty Mile limits, under the act of congress approved May 5, 1864, entitled " An Act making a grant of lands to the State of Minnesota to aid in the construction of the Railroad from St. Paul to Lake Superior" and the Act amendatory thereof approved July 13, 1866,
153 the said selections being from the lands of the United States, in the alternate sections designated by odd numbers, most contiguous to the tier of sections within ten sections in width on each side of the road from the City of St. Paul to the head of Lake Superior," and being in lieu of the land in alternate sections designated by odd numbers within ten said sections in width on each side of said road, which the United States has legally sold, or to which the right of Pre-emption had legally attached, prior to the period at which the rights of the State inured under said grant; and they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of said acts of May 5th, 1864 and July 1, 1866, subject to all its conditions, and to any valid interferring rights which may exist to any of the tracts embraced in the foregoing list.

In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of the General Land Office to be affixed, at the City of Washington, on the day and year first hereinabove written.

[Seal] JOSEPH S. WILSON,
Commissioner.

Department of the Interior.

Washington, City, March 25, 1868.

Approved, subject to the conditions and rights above mentioned.

O. H. BROWNING, Secretary."

Complainant offers in evidence Exhibit "O", being an exemplified copy of the approval of the selection of the Northern Pacific Railroad Company for indemnity on the S. W. 1/4 of the S. E. 1/4 of Section 7, Township 54, North of Range 14 West, for the loss of the N. W. 1/4 of the N. E. 1/4 of Section 11, Township 46, North of Range 16 West, date of approval October 17, 1905.

Complainant offers in evidence Exhibit "P", being Receiver of the United States Land Office receipt of Richard B. Jones, dated December 10, 1898, for the S. W. 1/4 of the S. E. 1/4 of Section 7, in Township 54, North of Range 14 West.

Mr. Sanders:

Objected to as incompetent, irrelevant and immaterial.

Mr Hoyt:

Complainant offers in evidence Exhibit "Q", being Special Warranty Deed, dated December 19, 1898, from Richard B. Jones and wife to Minnie Stewart, for the S. W. 1/4 of the S. E. 1/4 of Section 7, Township 54 North of Range 14 West. Deed recorded October 3, 1902.

154 Mr. Sanders:

Same objection.

Mr. Hoyt:

Complainant offers in evidence Exhibit "R", being deed from Minnie Stewart, and Moses Stewart, her husband, to Herbert H. Hoyt, dated March 22, 1902, for the S. W. 1/4 of the S. E. 1/4 of Section 7, Township 54 North of Range 14 West, acknowledged and duly recorded.

Stipulation:

It is hereby stipulated by and between the parties hereto that attached to Northern Pacific Railroad Company Selection

List, No. 15, filed October 17, 1883, and which list embraces the land in controversy in this case, is a certificate in words and figures following, to-wit:

State of Minnesota,
County of Ramsey—ss.

"I, Charles B. Lamborn, being duly sworn, depose and say: That I am the Land Commissioner of the Northern Pacific Railroad Company; that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by the said Northern Pacific Railroad Company, as enuring to said company to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the Northern route for which a land grant was made by the act of congress approved July 2, 1864, and by the Joint Resolution approved May 31st, 1870; that the said lands are vacant, unappropriated and are not interdicted mineral or reserved lands, and are of the character contemplated by the grant being within the limits of forty miles on each side of the line of the route for a continuance distance of miles of said railroad, commencing and ending

155

CHAS. B. LAMBORN, (L. S.)

Sworn to and subscribed before me this 15th day of October, 1883.

GEO. W. BOARD,
[Seal] Notary Public.

And it is further stipulated that attached to Northern Pacific Railroad Company's certified list No. 15B (which list embraces the land here in controversy) is a certificate in words and figures following, to-wit:

"Whereas, the Northern Pacific Railroad Company has heretofore, to-wit, on the 17th day of October, 1883, duly selected under the directions of the Secretary of the Interior those certain tracts and parcels of land particularly set forth and described in Duluth list No. 15, filed in the United States District Land Office, at Duluth, Minnesota, on the 17th day of October, 1883, as indemnity for certain tracts and parcels of odd-numbered sections of land within the limits of the grant to said railroad company, which said tracts were reserved, sold, granted and otherwise appropriated, or not free from pre-emption or other claims or rights at the time the line of its road was definitely located in accordance with the provisions of the act of congress approved July 2, 1864, and of the joint resolution of congress approved May 31, 1870, which lands so

situated are on and within forty miles of the line of the said road, as so definitely located.

"And, whereas, the Secretary of the Interior has, since the filing of said above described list, further directed that said list shall be rearranged so it shall indicate the specific loss in lieu of which each specific selection has been made. Now, therefore, to comply with the further requirements of the Interior Department, but not waiving or abandoning rights and claims heretofore acquired by virtue of its selection heretofore made under the direction of the Secretary of the Interior, the said Northern Pacific Railroad Company has herein designated the lands heretofore selected as indemnity in said Duluth list No. 15, and no other lands, and as herein set opposite each specific description of the land lost from its grant in place, and in lieu of which said indemnity land is selected."

St. Paul, Minnesota, April 10, 1893.

CHAS. B. LAMBORN,
Land Commissioner N. P. R. R. Co."

156 Mr. Hoyt: I want to introduce the first annual report of the Northern Pacific Railway to the Railroad Commissions in the State of Wisconsin, for the ten months, ending June 30th, 1897.

Now, I offer this report in evidence for the purpose of introducing in evidence on page 1, the first 1, 2, 3, 4 and 5 questions.

The first question:

Q. Name of Common Carrier making this report?

A. Northern Pacific Railway Company.

Second question: "Date of Organization: A. 1870."

Third Question: "Under the laws of what government, state or territory organized? If more than one, name all; give reference to each statute and all amendments thereof.

Answer: Wisconsin Special Act, approved March 15, 1870; amended January 20, 1871; March 6, 1871 and April 15, 1895, formerly entitled Superior & St. Croix Railroad Company; changed to present name by resolution of stockholders and directors, in July, 1896.

Fourth Question: If a consolidated company, name the constitutent companies; give reference to chapter of each and all amendments of name?

A. Not a consolidated Company.

Question Five. If an organized company, give name of original corporation, and refer to laws under which it was organized.

A. Not a consolidated company."

On page 2:

First Question: Name of Directors, and post office address and date of expiration of term?

Answer: Edward D. Adams, New York; Robert Macon, New York; Dumont Clark, Charles H. Coster, Robert M. Galloway, Brayton Ives, D. Willis James, Walter G.
157 Oakman, Samuel Spencer, Francis Lynde Stedson, James Stillman, Eban B. Thomas. All of New York, Charlemagne Tower, Jr., Philadelphia, E. W. Winter, St. Paul.

Total number of stockholders at date of last election 16.

Date of last meeting of stockholders for election, October 6, 1896.

Capital Stock of the Northern Pacific Railway Company, One Hundred and fifty-five Million Dollars.

Amount of Common Stock, Eighty Million.

Preferred Stock, Seventy-Five Million.

Total cost of road and equipment, September 1, 1896, property purchased at foreclosure, $293,947,706.35.

Equipment purchased at foreclosure, $12,692,180.00.

Note attached as follows:

"Inasmuch as property purchased at foreclosure embraced nearly Thirty-one million acres of land, it would be manifestly misleading to figure cost per mile on the amount shown hereunder the head "Cost per Mile".

On page 26, it appears as follows:

"This is the first annual report of the Northern Pacific Railway Company.

Mr. Sanders: All of which is objected to as incompetent, irrelevant and immaterial.

Duluth, Sept. 28, 1906.

Same Appearances.

Stipulation.

It is stipulated and agreed by and between the parties hereto that the land involved in this suit exceeds the value of $2,000.00.

Mr. Hoyt: I offer in evidence Exhibit "T", being
158 an exemplified copy of the extract from the journal of the Senate of the United States, 54th Congress, First Session, April 8th, 1896, on pages 228 and 229.

Mr. Sanders: Objected to as incompetent, irrelevant and immaterial.

Mr. Hoyt: I offer in evidence the certified copy of Congressional Record of the Senate, 54th Congress, Second Session, January 23rd, 1897, page 1099.

Mr. Sanders: Same objection.

Mr. Hoyt: Would like to withdraw this and put in copy which is consented to by Mr. Sanders.

Mr. Hoyt: Offer in evidence Exhibit "V". Annual report of the Northern Pacific Railway Company to the Railroad Commission of the State of Wisconsin, for the year ending June 30th, 1905, and refer to page 1, paragraph 1:

"Q. Name of common carrier making this report?
A. Northern Pacific Railway Company."

Paragraph 2:

"Q. Date of organization?
A. Chartered by State of Wisconsin, March 15th, 1870, amended March 6, 1871 and April 15, 1895."

Paragraph 3:

"Q. Under the laws of what government, state or territory organized? If more than one, name all, give reference to each statute, and all amendments thereof?
A. Same above."
"Q. Original name?
A. Superior & St. Croix R. R. Co., changed in July 1896, by Resolution of the Stockholders and Directors of the Northern Pacific Railway Company."

159 Paragraph 4:

"Q. If a consolidated Company, name the constituent Companies. Give reference to the charters of each, and all amendments of same?
A. Not a consolidated company."

On page 2:

"Q. Name of Directors, Post Office address and date of expiration of term?
A. George F. Baker, New York, October, 1907. Robert Baker, New York, October, 1907. William P. Clough, New York, October, 1905. Alexander H. Corchran, New York, 1905. Howard Elliott, St. Paul, October, 1906. Amos French, New York, October, 1905. James M. Hill, New York, October, 1905. D. Willis James, New York, 1907. John S.

Kennedy, New York, 1907. Louis D. Ledyard, New York, October, 1906. Daniel S. Lamont, New York, October, 1906. George W. Perkins, New York, October, 1906. Charles Steele, New York, October, 1906. John Sloan, New York, October, 1907. Payne Whitney, New York, October, 1905."

On Page 12: Capital Stock:

"Capital Stock? Common. Number of shares authorized, 1,550,000[00]; par value of shares: 100. Total par authorized, $155,000,000. Dividend, 7%, amounting to $10,850.00."

On page 14:

"Funded debt, mortgage bonds and miscellaneous obligations; Northern Pacific Railway Company, prior lien, 1897, due in 1997. One hundred and thirty miles; amount outstanding $103,939,500.00. Rate 4. General Line, in 1897, due in 2047; amount outstanding: 60 miles."

On page 18:

"Funded Debt. Recapitulation. Amount outstanding, $293,087,449.36."

On page 20:

"Northern Pacific Railway Company $155,000,000.00. Funded debt: $185,475,849.36."

On page 26:

"In reference to the cost of the road and equipments: $291,148,670.16."

160 On page 26 Memorandum is:

"It is impossible to give cost by classification, inasmuch as property purchased at foreclosure embraced nearly 31,000,000 acres of land, it would be manifestly misleading to figure cost per mile on the amount shown."

Mr. Sanders: Objected to as incompetent, irrelevant and immaterial.

Evidence taken on Behalf of the Defendants.

Mr. Sanders: We offer in evidence Exhibit "1", a copy of Northern Pacific Railway Company's Selected List, No. 15, wherein is selected the land in controversy, to-wit: The $SW\frac{1}{4}$ of $SE\frac{1}{4}$ of Section 7, in Township 54, North of Range 14 West of the Fourth Principal Meridian, Minnesota.

We offer in evidence Exhibit "2", being a copy of Northern Pacific Railway Company's Selection List, 15-B, wherein is

selected the land in controversy, to-wit: The $SW\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 7, in Township 54 North Range 14 West of the Fourth Principal Meridian, Minnesota.

We offer in evidence Exhibit "3", a certified copy of the map of the definite location of the Northern Pacific Railroad from a point on the main line of the Northern Pacific Railroad near the right bank of the St. Louis, in Minnesota, to a point in Section 15, Township 47 North, Range 2, West of the 4th Principal Meridian, in Wisconsin.

We offer in evidence Exhibit "4", certified copy of the map of the definite location of the Northern Pacific Railroad from Thompson Junction, Minnesota, to the Red River of the North, the border line between Minnesota and North Dakota.

Sherman H. Mason, called as a witness on behalf of the defendant, being first duly sworn testifies as follows:

Direct Examination,

By Mr. Sanders:

161 Q. What is your name? A. Sherman H. Mason.

Q. Where do you reside? A. St. Paul.

Q. What is your occupation?

A. Draftsman of the Land Department of the Northern Pacific.

Q. I hand you a map, Mr. Mason, will you please tell us what that map shows?

A. It is a blue print from the tracing of the constructed line of the Lake Superior & Mississippi Railroad, as filed in the office of the Governor of Minnesota on June 30th, 1870, covering the line of said railroad from St. Paul to Duluth, and being in four sections.

Cross Examination,

By Mr. Hoyt:

Q. You made that map from the original; did you make the map?

A. It was made under my direction.

Q. You didn't make it yourself? A. No sir.

Q. And it was made from the original—was there an original?

A. There is an original in the office of the Governor.

Q. Is that in the Governor's office?

A. The point is this, your Honor, the record in the Northern Pacific office is what they call a diagram, taken from the tracing in the Governor's office.

Q. You mean a photograph, a negative?

A. Practically a negative, a facsimile.
Q. That map is made from the negative?
A. This is made from the negative.
Q. And you didn't make it?
162 A. I saw it made.
Q. You saw it made, supervised it?
A. Yes sir.
Q. Your clerk made it?
A. Well, what we call the blue printer made it.

Mr. Sanders: We offer the map testified to by Mr. Mason in evidence as defendant's exhibit "5".

Mr. Hoyt: Objected to as incompetent and immaterial, because it is not the original map or an actual copy.

Mr. Sanders: I hand you another map, Exhibit "6", will you please tell us what this map is designed to show?
A. It is a general map showing on a small scale, for the sake of convenience, the railroads as shown on the other three maps previously offered, that is, defendant's Exhibits "3", "4" and "5".
Q. What is the red line?
A. The red line is the line of definite location of the Northern Pacific Railroad.
Q. From where to where?
A. From the Red River to Ashland, Wisconsin.
Q. What is the black line running North and South?
A. The black line is the line of constructed road of the Lake Superior and Mississippi Railroad.
Q. Did you prepare that map? A. Yes.
Q. From the three maps, defendant's Exhibits "3", "4" and "5"? A. Yes.

163 Q. Does it correctly show the crossing of the Northern Pacific Railroad with the Lake Superior and Mississippi Railroad? A. It does.

We offer the map last testified to by Mr. Mason in evidence as defendant's Exhibit "6".

Cross Examination

By Mr. Hoyt:
Q. Mr. Mason, did you prepare that map yourself?
A. Yes, sir.
Q. What did you prepare it from?
A. From the three maps previously offered in evidence.
Q. Yes, I know, but were they the official maps of the Government, or maps in your office, the Northern Pacific Railroad Company's office?

A. The maps and the records of the railroad company.

Q. You don't know whether those maps are correct or not, do you, from your own knowledge?

A. Nothing, except that they are practically certified copies.

Q. Certified by whom?

A. Certified by the Commissioner of the General Land Office.

Q. All three of them?

A. No, the Northern Pacific maps.

Q. Well, I mean all three of the maps that your composite maps are made of?

A. Two of them, the two maps of the Northern Pacific is certified by the Commissioner of the General Land Office.

Q. How is it with the Lake Superior and Mississippi map?

A. That is a facsimile of the map filed in the office of the Governor of Minnesota.

Q. And as far as you know that is the only evidence
164 that you have of its being an authenticated copy?

A. Yes, sir. From the fact—

Q. How long have you been in the employ of the Northern Pacific? A. My present position since July 1st, 1906.

Objected to Exhibit "6" as incompetent, and it does not appear to be an official map of the Government.

Sydney Livesey, called as a witness on behalf of defendants, being first duly sworn testifies as follows:

Direct Examination

By Mr. Sanders:

Q. What is your name? A. Sydney Livesey.

Q. What is your age? A. Twenty-Six years.

Q. Where do you live? A. St. Paul, Minnesota.

Q. What is your occupation? A. Stenographer.

Q. In whose employ?

A. In the employ of the Northern Pacific.

Q. Mr. Livesey, I hand you a paper marked "Original Order of Sale" and ask you, is this a true, full and correct copy of the original of that instrument, of that paper on file in the office of the United States Circuit Court for the District of Minnesota, Third Division? A. It is.

Q. Did you compare this paper with the original on file in the Clerk's office? A. I did, sir.

165 Q. Mr. Livesey, I hand you two papers, one designated "Amended Order of Sale" the other "Report of Sale" and ask you if these are true, full and correct copies of the originals of said paper on file in the office of the Clerk of the United States Circuit Court, for the District of Minnesota, Third Division?

A. This paper, "Report of Sale" is not a full copy of it. On page 4, we have left out counties prior to St. Louis County, and after the record as to St. Louis County comes other counties of the state, which have been left out. Except as to those, this is a true, and correct copy of the original on file in the Circuit Court of the United States, the Third District of Minnesota.

Q. Then is it a true and correct copy so far as St. Louis County is concerned?

A. Yes, sir, it is. As to the "Amended Order of Sale", I can certify that that is a true and correct copy.

Cross Examination

By Mr. Hoyt:

Q. Do those three copies have reference to one suit, the same suit? A. Yes, sir.

Q. What is the suit?

A. Farmer's Loan & Trust Company vs. Northern Pacific Railroad Company, Phillip B. Winston

Q. And others? A. Yes, sir.

Q. And all three have reference to the same?

A. Yes, Sir, all between the same parties.

166 Mr. Sanders: We offer in evidence the papers testified to by Mr. Livesey, designated "Original Order of Sale", as defendants Exhibit "7".

We also offer in evidence the paper testified to by Mr. Livesey and designated "Amended Order of Sale" as Defendant's Exhibit "8".

We also offer in evidence the paper testified to by Mr. Livesey, designated "Report of Sale" as defendant's Exhibit "9".

Mr. Hoyt: Object to Defendant's Exhibit "7", "8" and "9" as immaterial and incompetent. No foundation laid to introduce them.

Mr. Sanders:

Q. Mr. Livesey, in the Master's Report of the sale of the land, reference is had to a schedule commending said report, have you seen the original schedules on file in the office of the Clerk of the United States Circuit Court, District of Minnesota, Third Division? A. I have.

Q. I hand you a book marked "Schedule of Lands of the Northern Pacific Railroad Company in the State of Minnesota, to be sold as advertised, at the court houses of the counties in which said lands are situated under the Decree of the United States Circuit Court for the Eastern District of Wisconsin, dated May 25th, 1899, have you compared this book with the

original schedule on file with said Clerk, and, if so, to what extent?

A. I have compared this schedule with the one on file in the United States Circuit Court, District of Minnesota,
167 Third Division, as to schedule A-2 of the list of patented and selected lands of the Northern Pacific Railroad Company in the State of Minnesota, County of St. Louis.

Q. Did you examine it specially with reference to the Southwest Quarter of the Southeast Quarter of Section 7, Township 54, North of Range 14 West, the land here in controversy?

A. Yes, sir.

Q. Is this book which you now have in your hand, a true and correct copy of the original on file with the Clerk of the United States Circuit Court in so far as it relates to land last described? A. Yes, sir.

Q. To the best of your knowledge and belief is the whole book an exact duplicate of the original on file in the Clerk's office?

A. Yes, because the print and the form of setting it up, and any notes found herein are also found in that same copy.

We offer the schedule testified to by Mr. Livesey in evidence as Defendant's Exhibit "10".

Cross Examination.

By Mr. Hoyt:

Q. What is your position with the Northern Pacific Railroad Company? A. I am a stenographer.

Q. How long have you occupied that position?

A. In the Department that I am now since April 18th of this year.

Q. Well, in any department there as stenographer; did you commence as stenographer the 18th of September this year?

A. No, sir.

Q. How long have you been a stenographer there?

A. I begun work for the Northern Pacific on the 18th of November, 1903.

168 Q. 1903?

A. Yes, sir, and worked—

Q. What is the date of that report? A. This schedule?

Q. Yes. A. This is May 25th, 1899.

Q. Well, then you don't know anything about that except as you found it in the office, do you? A. Yes, sir.

Q. What do you know about it?

A. I know that I compared it with the schedule—

Q. No, no, no; I am speaking—before you did this work here. I am not asking you about your comparing it, I am asking you until you were employed in the office in 1903, you didn't know anything about that book, do you?

A. No, sir I did not.

Q. And you don't know now anything about it, except as you have found it in the office and compared it with the original papers in the United States Court, is that it?

A. No answer.

Q. Do you understand the question?

A. I don't see just what you are trying to get at, Judge.

Q. All the knowledge that you have of that book as to its being a correct and true copy is because you found it in the office among the papers of the Northern Pacific Railway Company, and then you took and compared it with the copy in the United States Circuit Court in the case, same case, is that all? A. Yes, sir, that is all.

169 Q. So you don't know—Do you know that man who made that report? A. No, sir, I do not.

Q. Nor when it was made, except by the date?

A. That's all.

Objected to it as incompetent and immaterial, and not properly identified.

Mr. Sanders: We offer in evidence, Exhibit "11", a certified copy of a decree by the United States Circuit Court, for the District of Minnesota, in the case of the Farmer's Loan & Trust Company vs. The Northern Pacific Railway Company, et al, dated May 27, 1896.

Mr. Hoyt: Object to the paper offered in evidence on the ground that it is immaterial and incompetent, and nothing to do with this suit.

Mr. Sanders: We offer in evidence, Exhibit 12, certified copy of an order made by the United States Circuit Court, for the District of Minnesota, in the case of the Farmer's Loan & Trust Company, complainant vs. Northern Pacific Railroad Company, et al, defendants, confirming the sale of the lands of the Northern Pacific Railroad Company by Alfred L. Carey, Special Master, dated September 20, 1899.

Mr. Hoyt: Objected to as incompetent and immaterial.

170 Mr. Sanders: We offer in evidence Exhibit "13", being a deed dated September 22, 1899, from Alfred L. Carey, as Special Master, and Edwin H. McHenry and Frank G. Bigelow, as Receivers of the Northern Pacific Railroad Company to the Northern Pacific Railway Company, embracing the land involved in this controversy, which said deed is recorded in St. Louis County, Minnesota, in Book 177 of Deeds, page 313.

Mr. Hoyt: Objected to as incompetent, immaterial.

Mr. Sanders: We offer in evidence Exhibit "14", a deed dated December 21, 1899, from the Northern Pacific Railroad Company to the Northern Pacific Railway Company, embracing the land involved in this controversy, which deed is recorded in St. Louis County, Minnesota, in Book 188 of Deeds, page 568.

Mr. Hoyt: Object to that as immaterial, and with no authority to convey.

Mr. Sanders: We offer in evidence Exhibit "15", copy of a deed dated January 19, 1900, from the Northern Pacific Railway Company to Frederick Weyerhaeuser and John A. Humbird, conveying the land involved in this controversy.

Stipulation.

It is hereby stipulated and agreed that the deed last offered in evidence by defendants is a true and correct copy of
171 the original thereof in so far as it relates to the land in controversy.

It is stipulated that the land in controversy, to-wit the Southwest Quarter of Southeast Quarter (SW 1/4 of SE 1/4) Section Seven (7), Township Fifty-four (54) North of Range Fourteen (14) West of the Fourth Principal Meridian, was patented to the Northern Pacific Railway Company on October 18, 1905.

Stipulation:

It is stipulated between the parties hereto that complainant's Exhibit "D", attached to the bill of complaint contains true copies of the act to incorporate the Superior & St. Croix Railroad Company and of certain acts amendatory thereto, and of the record of certain proceedings taken to change the name of the Superior & St. Croix Railroad Company to the Northern Pacific Railroad Company, and that an authenticate certified copy thereof was filed in the office of the Secretary of State for the State of Minnesota, and in the office of the Register of Deeds of Ramsey County, Minnesota, and that thereafter and on the 13th day of July, 1896, said railway company duly appointed Edwin W. Winter as its agent and empowered him and authorized him to accept service of summons in any civil action in which said corporation may be a party, which said appointment was duly filed in the office of the Secretary of State, State of Minnesota, in the office of the Register of Deeds of Ramsey County of the State of Minnesota, and that on the 23rd day of July, 1896, the Northern Pacific Railway Company duly paid the State Treasurer the State tax, in accordance with the act approved April 24th, 1899, on its original capital stock.

We offer in evidence a circular from the General Land Office containing regulations in respect to Act of Congress
172 approved July 1, 1898, as Defendant's Exhibit 16.

Duluth, Nov. 27, 1906.

Same Appearances:

Mr. Sanders: We offer in evidence as Defendants' Exhibit "17", copy of the Act of Congress approved April 28, 1904, entitled "An Act Validating certain conveyances of the Northern Pacific Railroad Company and the Northern Pacific Railway Company."

We offer in evidence as Defendant's Exhibit "18" copy of "An Act of Congress approved May 17, 1906, entitled "An Act for the Relief of Certain Entrymen and Settlers within the limits of the Northern Pacific Railway Land Grant."

Mr. Hoyt: Objected to as incompetent, irrelevant and immaterial as to both the above acts of congress.

It is stipulated that the above copies are true and correct copies of the original statutes.

In offering documentary evidence in this case certain certified copies were offered in evidence, which certified copies were, by consent of the parties, afterwards withdrawn, and copies of the same were substituted in their place.

It is hereby Stipulated and Agreed, By and between the parties hereto that the copies now in evidence as Exhibits shall be received in lieu of the certified copies originally offered in evidence.

173 54th Congress,
1st Session.

S. R. 124.

In the Senate of the United States.

April 8, 1896.

Mr. Mitchell, of Oregon, introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary.

Joint Resolution.

To facilitate the reorganization of the Northern Pacific Railroad Company, to secure to actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation,

sale, or other corporate action control of its railroad to any corporation, company, person or association of per-
174 sons owning, operating, or controlling a parallel or competing railroad.

1 Resolved by the Senate and House of Representatives of the
2 United States of America in Congress assembled, That the pur-
3 chasers of the railroad property of the Northern Pacific Railroad
5 in any suit or suits for the foreclosure of any of the mort-
6 gages heretofore executed by said company thereon, may or-
7 ganize anew by filing in the office of the Secretary of the Interior a
8 copy of the deed or deeds conveying said railroad and property with
9 a certificate, signed by

2

1 a majority of them, setting forth the name adopted by them, the names,
2 number and residences, respectively, of its directors, and a copy
3 of any plan of reorganization adopted by said purchasers or pur-
4 suant to which such purchase shall have been made. Upon filing
5 such certificates such purchasers, their associates, successors,
6 and assigns shall, by the name specified in said certificate, have
7 and be invested with all the estate, right, title, and interest
8 of said purchasers in and to such railroad and property, and shall
9 possess franchises, rights and powers the same as the Northern Pa-
10 cific Railroad Company, and shall be subject to all the obliga-
11 tions and duties imposed by Congress upon said company, and may
12 acquire and hold any property and branches of the Northern Pa-
13 cific Railroad Company; and it may acquire and construct addi-

tional branches or feeders in any State as authorized by the laws thereof; and upon such terms and conditions as may be provided in the plan of reorganization filed aforesaid it may from time to time issue such bonds, secured by mortgage upon its property and franchises or otherwise, not exceeding in the aggregate the sum of one hundred and ninety million dollars, and twenty-five thousand dollars additional per mile for railroad hereafter constructed, and such stocks, preferred or common, as shall have been authorized by such plan: Provided, That except as such stock shall have been issued for property acquired under such plan, no additional stock shall be issued,

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except for money, labor, or property estimated at its actual cash value, to the par or face value of the stock, and that any such mortgage shall be filed and recorded in the office of the Secretary of the Interior as sufficient proof and notice of its legal execution and effectual delivery and of the lien thereby created; Provided, That such successor company, its successors and assigns, shall sell to any applicant therefor for purpose of actual settlement and cultivation in tracts of not less than forty nor more than one hundred and sixty acres each at a price not exceeding two dollars and fifty cents per acre, any agricultural land, lying more than one mile from said railroad and then unsold, heretofore granted by Congress to the Northern Pacific Railroad Company and acquired by purchasers as aforesaid, but this proviso shall not apply to lands chiefly valuable for timber, coal, iron, or stone; and said Company may reserve to itself, its successors and assigns, in the sale of any lands applied for hereunder, merchantable timber and stone not needed for building and fencing thereon, and all coal and iron which may be found therein, and the right to take therefrom gravel for its own

uses: Provided, however, That said company shall have the right
to reserve from sale hereunder and to otherwise dispose of
such tracts or bodies of arid lands as it shall deem necessary
or advisable for use in any way in promoting and developing
irrigation, through companies or associations organized under

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and subject to the laws of the States in which such lands
are situated; And provided, That neither the Northern
Pacific Railroad Company nor such successor corporation, its
successors or assigns, shall consolidate its stock with
or sell, convey or lease said railway, or by other corporate action give control or management over and of the same,
to any corporation, company, person, or association of persons
owning, operating of controlling a parallel and competing line
of railway; and any contract entered into by said successor
company in violation of the provisions hereof shall be null and
void, and may be enjoined at the suit of the United States
or any State in which said road or any part thereof is situate
in any court of competent jurisdiction: And provided also,
that nothing herein contained shall be construed as making
any additional grant of lands to such successor corporation or
as a waiver of any right of the United States now existing
to enforce any forfeiture of lands heretofore granted to the
said Northern Pacific Railroad Company or as in any manner
affecting the vested rights of any settler or settlers on any of
the lands heretofore granted to the Northern Pacific Railroad
177 21 company or of any purchaser or purchasers of any such lands
22 from said company.

Endorsed on back:

54th Congress,
1st Session.

S. R. 124.

Joint Resolution.

To facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person or association of persons owning, operating or controlling a parallel or competing railroad.

By Mr. Mitchell,
of Oregon.

April 8, 1896.—Read twice and referred to the Committee on the Judiciary.

(Copy.)

(Calendar No. 821.)

54th Congress,
1st Session.

S. R. 124.

(Report No. 776.)

In the Senate of the United States.

April 8, 1896.

Mr. Mitchell, of Oregon, introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary.

April 21, 1896.

Reported by Mr. Mitchell, of Oregon, with amendments, viz.: Omit the parts struck through and insert the parts printed in italics.

178 Joint Resolution.

To facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person, or association of persons, owning, operating, or controlling a parallel or competing railroad.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the purchasers of the railroad property of the Northern Pacific Railroad Company, which may at any time hereafter be sold as a judicial sale in any suit or suits for the foreclosure of any of the mortgages heretofore executed by said

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company thereon, may organize anew by filing in the office of the Secretary of the Interior a copy of the deed or deeds conveying said railroad and property with a certificate, signed by a majority of them, setting forth the name adopted by them, the names, number and residences, respectively; of its directors, and a copy of any plan of reorganization adopted by said purchasers or pursuant to which such purchase shall have been made. Upon filing such certificate such purchasers, their associates, successors, and assigns, shall, by the name specified in said certificate, have and be invested with all the estate, right, title, and interest of said purchasers in and to such railroad and property, and shall possess franchises, rights,

179 13

and powers the same as the Northern Pacific Railroad Company, and shall be subject to all the obligations and duties imposed by Congress upon said company, and may acquire and hold any property and branches of the Northern Pacific Railroad Company; and it may acquire and construct additional branches or feeders in any State as authorized by the laws thereof; and ~~upon such terms and conditions as may be provided in the plan of reorganization filed aforesaid~~ it may

from time to time issue ~~such~~ bonds, secured by mortgage upon its property and franchises or otherwise, not exceeding in the aggregate the sum of one hundred and ninety million dollars, and twenty-five thousand dollars additional per mile for railroad hereafter constructed, the interest on any of which bonds

3

shall not exceed four per centum per annum, and ~~such~~ stocks, preferred or common, ~~as shall have been authorized by such plan~~, not exceeding in the aggregate one hundred and fifty-five million dollars, of which amount not exceeding seventy-five million dollars may be preferred, but the preference of the preferred stock as to dividends shall not exceed four per centum per annum: Provided, That except ~~as~~ such stock as shall ~~have been~~ be issued for property acquired under such ~~plan~~ foreclosure proceedings, no additional stock shall be issued except for money, labor, or property, ~~estimated~~ at its actual cash value, to the par or face value of the stock, which may be common stock or preferred stock, or both, as may be authorized at stockholders' meetings, and that any such mortgage shall be filed and recorded in the office of the Secretary of the Interior as sufficient proof and notice of its legal execution and effectual delivery and of the lien

180 thereby created: Provided, that such successor company, its successors and assigns, shall sell to any applicant therefor

for purposes of actual settlement and cultivation in tracts of not less than forty nor more than one hundred and sixty acres each at a price not exceeding two dollars and fifty cents per acre, any agricultural lands, lying more than one mile from said railroad and then unsold, heretofore granted by Congress to the Northern Pacific Railroad Company and acquired by purchasers as aforesaid, but

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this proviso shall not apply to lands chiefly valuable for timber, coal, iron, or stone; and said company may reserve to itself, its successors and assigns, in the sale of any lands applied for hereunder, merchantable timber and stone not needed for building and fencing thereon, and all coal and iron which may be found therein, and the right to take therefrom gravel for its own uses: Provided, however, That said company shall have the right to reserve from sale hereunder and to otherwise dispose of such tracts or bodies of arid lands as it shall deem necessary or advisable for use in any way in promoting and developing irrigation, through companies or associations organized under and subject to the laws of the States in which such lands are situated: And provided further, That neither the Northern Pacific Railroad Company nor such successor corporation, its successors or assigns, shall consolidate its stock, or the stock at any time by it held in any [subsidairy] corporation, with or sell, convey, or lease said railway, or by other corpor-

ate action give control or management over and of the same, to any corporation, company, person, or association, of persons ~~owning, operating, or controlling a parallel and competing line of railway~~ whatever without the consent of Congress; and any contract entered into by said successor company in violation of the provisions hereof shall be null and void, and may be enjoined at the suit of the United States or any State in which said road or any any part thereof is situate.

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in any court of competent jurisdiction: And provided also that nothing herein contained shall be construed as making any additional grant of lands to such successor corporation or as a waiver of any right of the United States now existing to enforce any forfeiture of lands heretofore granted to the said Northern Pacific Railroad Company or as in any manner affecting the vested rights of any settler or settlers on any of the lands heretofore granted to the Northern Pacific Railroad Company or of any purchaser or purchasers of any such lands from said company.

Sec. 2. That Congress shall at all times have the power to alter, amend or repeal this resolution.

Calendar No. 821.

Endorsed on back:

54th Congress,
1st Session.

S. R. 124.

(Report No. 776.)

Joint Resolution.

To facilitate the reorganization of the Northern Pacific Railroad Company, to secure to actual settlers the right to purchase at a price not exceding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from

giving by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person, or association of persons owning, operating, or controlling a parallel or competing railroad.

By MR. MITCHELL, of Oregon.

April 8, 1896. Read twice and referred to the Committee on the Judiciary.

April 21, 1896. Reported with amendments.

54th Congress,
1st Session.

S. R. 124.

In the Senate of the United States.

Ordered to be printed. May 16, 1896.

Amendment.

Intended to be proposed by Mr. Jones, of Arkansas, to the joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company, to secure to actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person, or association of persons owning, operating or controlling a parallel or competing railroad, viz: At the end of the resolution insert the following:

Provided further, that the said purchasers of the rail-
183 road property of the Northern Pacific Railroad Company shall
not acquire and hold any property within the Yellowstone
National Park on any bond or security of any corporation or
company doing business therein. It may, however, make
traffic agreement concerning the transportation of persons
or property to and from said park: And provided further, that
said purchasers shall carry out all existing traffic and operat-

2

ing agreements of the Northern Pacific Railroad Company
and its receivers, and all decrees and orders made by the

11 Federal Courts in the receivership of said road.
Endorsed on back:

54th Congress,
1st Session.

S. R. 124.

Amendment.

Intended to be proposed by Mr. Jones, of Arkansas, to the joint resolution (S.R.124) to facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company, or any successor company from giving by consolidation sale, or other corporate action control of its railroad to any corporation, company, person or association of persons owning, operating, or controlling a parallel or competing railroad.

May 16, 1896. Ordered to be printed.

54th Congress,
1st Session.

S. R. 124.

184 In the Senate of the United States.

Ordered to be printed. May 25, 1896.

Amendment.

Intended to be proposed by Mr. Jones, of Arkansas, to the joint resolution (S.R.124) to facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase, at a price not exceeding two dollars and fifty cents per acre, the agricultural lands within its grant, and to prohibit said company or any successor company from giving, by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person, or association of persons, owning, operating, or controlling a parallel or competing railroad, viz: At the end of the resolution insert the following:

1 Provided further, that said purchasers of the rail-
2 road property of the Northern Pacific Railroad Company shall not
3 acquire and hold any property within the Yellowstone National
4 Park, or any stock, bond, or security of any corporation or
5 company doing business therein. It may, however, make traffic

agreements concerning the transportation of persons or property
to and from said park: And provided further, that said purchasers shall carry out all existing traffic and operating agreements of the Northern Pacific Railroad Company and its
receivers, and all decrees and orders made by the Federal courts in the receivership of said road.

185 Endorsed on back:

54th Congress,
1st Session.

S. R. 124.

Amendment.

Intended to be proposed by Mr. Jones of Arkansas, to the joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company, to secure to actual settlers the right to purchase, at a price not exceeding two dollars and fifty cents per acre, the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action, control of its railroad to any corporation, company, person, or association of persons, owning, operating, or controlling a parallel or competing railroad.

May 25, 1896. Ordered to be printed.

54th Congress,
1st Session.

S. R. 124.

In the Senate of the United States.

June 5, 1896.

Referred to the Committee and the Judiciary and ordered to be printed.

June 5, 1896.

Reported Favorable by Mr. Mitchell, of Oregon.

Amendment.

Intended to be proposed by Mr. Mitchell, of Oregon, to the joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company; to secure
186 to actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action control of its railroad to any cor-

poration, company, person, or association of persons, owning, operating, or controlling a parallel or competing railroad, viz:

And to the end of the first section the following:

And provided further, That in every case of failure of the title to any lands heretofore conveyed or contracted to be sold by said Northern Pacific Railroad Company, any and all rights of such purchaser or his assigns in respect of such land, on it respect of the failure of such title or in respect to the liability of said Northern Pacific Railroad Company on said contracts for the sale of lands, and all judgments heretofore or hereafter rendered against said Northern Pacific Railroad Company or against any of the receivers thereof

2.

in any court of the United States or in any State court, on account of any such failure of title, or on any covenants of warranty, or on account of any injury to any person or property, shall survive and may be enforced against such successor company with the same force and effect and in the same manner as against the Northern Pacific Railroad Company;

and all debts and liabilities which said Northern Pacific Railroad Company or the receivers thereof may have incurred on account of injuries to person and property, and on any covenants of warranty in any contract or deed for the conveyance of lands, shall, when final judgment thereon has been

187 or may hereafter be obtained, be paid by such reorganized company and may be enforced by execution or other proper final process directly against such reorganized company and its property and shall be a prior lien thereon; and this act is upon condition that such successor company shall within thirty days from the passage of this Act file in the office of the Secretary of the Interior its assent thereto and all the provisions thereof, and on failure to do so this Act shall become ipso facto null and void.

54th Congress,
1st Session.

S. R. 124.

In the Senate of the United States.

June 5, 1896.

Referred to the Committee on the Judiciary and ordered to be printed.

Amendment.

Intended to be proposed by Mr. Nelson to the joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving, by consolidation, sale, or other corporate action, control of its railroad to any corporation, company, person, or association of persons owning, operating, or controlling a parallel or competing railroad, viz:

At the end of the resolution insert the following.

188 1 And provided further, That such successor company, its
2 successors and assigns, shall succeed to all the rights and
3 be subject to all the liabilities created by any and all con-
4 tracts for the sale of lands heretofore granted by Congress to
5 the Northern Pacific Railroad Company, which said railroad
6 company or its receiver or receivers have made or shall make
7 prior to the acquisition of said lands by said successor company.

54th Congress,
1st Session.

S. R. 124.

In the Senate of the United States.

June 6, 1896.

Ordered to be printed.

Amendment.

Intended to be proposed by Mr. Smith to the joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the

right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving, by consolidation, sale, or other corporate action, control of its railroad to any corporation, company, person, or association of persons owning, operating, or controlling a parallel or competing railroad, viz: On page 2 in line 23, after the word "plan", insert the following:

Provided, however, That in consideration of the provisions of this resolution, the said organization by this resolution contemplated shall take up all the bonds of the Seattle, Lake Shore and Eastern Railway Company which were in any wise or at any time guaranteed by the Northern Pacific Railroad Company, and in exchange therefor issue an equal value of first-mortgage bonds of the new company by this resolation authorized as aforesaid.

I, Charles G. Bennett, Secretary of the United States Senate, do hereby certify that the foregoing typewritten sheets numbered consecutively 1 to 13 inclusive, are true and accurate copies of the printed originals thereof in the files of this Office.

Given this day under my hand and the seal of the Senate of the United States this second day of June, A. D., nineteen hundred and six.

[Seal] CHARLES G. BENNETT, Secretary.

Endorsed: Complainant's Exhibit E. Filed Dec. 1, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

190 Complainant's Exhibit F.

Calendar No. 821.

Senate.

54th Congress,
1st Session.

(Report No. 776.)

In the Senate of the United States.

April 21, 1896. Ordered to be printed.

Mr. Mitchell, of Oregon, from the Committee on the Judiciary Submitted the following:

CHARTS

TOO

LARGE

FOR

FILMING

Report:

(To accompany S. R. 124.)

The committee on the judiciary, to whom was referred the joint resolution (S. R. 124) to facilitate, the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding $2.50 per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person, or association of persons owning, operating, or controlling a parallel or competing railroad, having had the same under consideration, beg to submit the following report.

The purpose of this proposed legislation may be stated in a few words. It has been made to appear to your committee that the land grant and other property of the Northern Pacific Railroad Company, all of which is covered by mort-
191 gage liens, will at a very early date be sold under forclosure proceedings. This joint resolution, should it become a law, will enable the purchasers at such foreclosure sale, upon filing in the office of the Secretary of the Interior a copy of the deed or deeds conveying to them said railroad and property, together with a certificate signed by a majority of them, setting forth the name adopted by them, the names, number, and residences, respectively of the directors of the proposed new company, and a copy of any plan of reorganization adopted by said purchasers, or pursuant to which such purchase shall have been made, to reorganize under the name specified in such certificate, so that they, their associates, successors, and assigns shall have and be vested with all the estate, right, title, and interest of such purchasers in and to such railroad and property, and shall possess franchises, rights and powers the same as the Northern Pacific Railroad Company now possesses; such new company to be subject to all the obligations and duties imposed by Congress upon the Northern Pacific Railroad Company. Such new company is authorized to acquire and hold any property and branches of the Northern Pacific Railroad Company.

It may also acquire and construct additional branches or feeders in any State, in the manner authorized by the laws of such State, and may issue bonds secured by mortgage upon its property, franchises, and otherwise, not exceeding in the aggregate the sum of $190,000,000 and $25,000 additional per mile for railroad hereafter constructed.

This limit of bonds, not including those authorized on newly

constructed road, is some $18,000,000 less in amount than the bonds now outstanding of the Northern Pacific.

192 A limit is also placed upon the amount of stock to be issued by the new company. The aggregate shall not exceed $155,000,000, of which amount not exceeding $75,000,000 may be preferred, but the preference of the preferred stock shall not exceed 4 per centum per annum. Furthermore, such stock shall only be issued for property acquired under such foreclosure proceedings; no additional stock to be issued, except for money, labor, or property, at its actual cash value to the par or face value of the stock.

This resolution places certain restrictions on the new company to which the Northern Pacific Railroad Company is not subject.

It provides that such company shall sell to any applicant therefor, for purposes of actual settlement and cultivation, in tracts of not less than 40 nor more than 160 acres each, at a price not exceeding $2.50 per acre, any agricultural land lying not more than a mile from its road and then unsold, of the lands heretofore granted to the Northern Pacific Railroad and acquired by the purchasers under such foreclosure proceedings. This restriction, however, is not to apply to lands chiefly valuable for timber, coal, iron, or stone, nor to arid lands; the new company having the right to reserve from such sale arid lands, and to otherwise dispose of such tracts or bodies of the same as it shall deem necessary or advisable, for use in any way in promoting or developing irrigation through companies or associations organized under and subject to the laws of the States in which such lands are situated.

It is also provided in this measure that neither the Northern Pacific Railroad Company nor such successor corporation, its successor or assigns, shall consolidate its stock, or the stock at any time by it held in any subsidiary corporation with, or sell, convey, or lease said railway, or by other corporate action give control or management over and of the same

193 to any corporation, company, person, or association of persons whatever without the consent of Congress; and any contract entered into by such successor company in violation of such provisions shall be null and void, and may be enjoined at the suit of the United States or any State in which said road or any part thereof is situate, in any court of competent jurisdiction.

The resolution also provides that nothing in it contained shall be construed as making any additional grant of lands to such successor corporation, or as a waiver of any right of

the United States now existing to enforce any forfeiture of lands heretofore granted to the said Northern Pacific Railroad Company, or as in any manner affecting the vested rights of any settler or settlers on any of the lands heretofore granted to the Northern Pacific Railroad Company, or any purchaser or purchasers of such lands from said company.

The right to alter, amend or repeal this resolution is also by express terms reserved by Congress.

Your committee therefore report back the joint resolution. (S. R. 124) with the following amendments, and recommend its passage:

On page 2, in lines 16 and 17, strike out the following words: "upon such terms and conditions as may be provided in the plan of reorganization filed aforesaid."

On page 2, in line 18, strike out the word "such."

On page 2, in line 22, after the word "constructed", insert the following words: "the interest on any of which bonds shall not exceed four per centum per annum."

On page 2, in line 22, strike out the word "such".

On page 2, in line 23, strike out the following words: "as shall have been authorized by such plan," and insert in lieu thereof the following: "not exceeding in the ag-
194 gregate one hundred and fifty-five million dollars, of which amount not exceeding seventy-five million may be preferred, but the preference of the preferred stock as to dividends shall not exceed four per centum per annum."

On page 2, in line 24, strike out the third word "as", and insert in the same line, after the word "stock", the word "as", and strike out in the same line the word "have" and insert in lieu thereof the word "be".

On page 2, in line 25, strike out the following words: "Under such plan," and insert in lieu thereof the following: "under such foreclosure proceedings."

On page 3, in line 1, strike out the word "estimated".

On page 3, in line 2, after the word "stock", insert the following: "which may be common stock or preferred stock or both, as may be authorized at stockholders' meeting".

On page 4, in line 4, after the word "stock" insert the following: "or the stock at any time by it held in any subsidiary corporation."

On page 4, in lines 7, 8, and 9, strike out the following

words: "owning, operating, or controlling a parallel and competing line of railway," and insert in lieu thereof the following words: "whatever without the consent of Congress."

Add to the end of the resolution the following: "That Congress shall at all times have the power to alter, amend, or repeal this resolution."

U. S. Senate, Office of the Secretary.

I, Charles G. Bennett, Secretary of the United States Senate, do hereby certify that the foregoing printed
195 paper, number pages 1 to 3, inclusive, is a correct and authentic copy of the original thereof on file in this office. Senate Report No. 776, 54th Congress, 1st Session.

Given under my hand and the seal of the Senate of the United States this Second day of June, A. D. nineteen hundred and six.

[Seal] CHARLES G. BENNETT, Secretary.

Endorsed: Complainant's Exhibit F. Filed Dec. 1, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

196 Complainant's Exhibit G.

Extract from the Journal of the Senate of the United States.

Fifty-fourth Congress, April 8, 1896.
First Session. Pages 228, 229.

Mr. Mitchell, of Oregon, introduced a joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding $2.50 per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person, or association of persons owning, operating, or controlling a parallel or competing railroad; which was read the first and second times by unanimous consent and referred to the committee on the Judiciary.

April 21, 1896.
Page 253.

Mr. Mitchell, of Oregon, from the Committee on the Judiciary, to whom was referred the joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company, to secure to actual settlers the right to purchase at a price not exceeding $2.50 per acre the agricultural lands within its grant,

and to prohibit said company or any successor company from giving by consolidation, sale or other corporate action control
of its railroad to any corporation, company, person,
197 or association of persons owning, operating, or controlling a parallel or competing railroad, reported it with amendments and submitted a report (No. 776) thereon.

I, Charles G. Bennett, Secretary of the United States Senate, do hereby certify that the foregoing typewritten sheet is a true and accurate copy of entries in the Journal of the Senate of the United States relating to the joint resolution (S. R. 124), 54th Congress, First Session.

Given under my hand and the seal of the Senate of the United States this Second day of June, A. D. nineteen hundred and six.

[Seal] CHARLES G. BENNETT, Secretary.

Endorsed: Complainant's Exhibit G. Filed Dec. 1, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

198 Complainant's Exhibit K.

Northern Pacific Railway Company Board of Directors. July 13, 1898.

"Resolved; That the Northern Pacific Railway Company hereby accepts the provisions of the Sundry Civil Appropriation Bill, approved by the President of the United States July 1, 1898, concerning the land grant of the Northern Pacific Railroad Company; and that the Vice-President of this Company be, and hereby is, authorized to communicate to the Secretary of the Interior such acceptance by this Company, of the provisions of the Sundry Civil Appropriation Bill.

I, George H. Earl, Secretary of the Northern Pacific Railway Company hereby certify that the foregoing is a true copy of a resolution adopted by the Board of Directors of said Company at their meeting held on the 13th day of July, 1898.

GEO. H. EARL, Secretary.

Endorsed on back: 2972. Dep't of the Interior received July 22, 1898, L. & R. R. Div. 1898—74045.

Northern Pacific Railway Company,
Office of the Vice President. 35 Wall Street, New York.
July 21, 1898.

Sir: I beg to enclose herewith a certified copy of a resolution adopted by the Board of Directors of the North-
199 ern Pacific Railway Company, formally accepting on the part of this Company the provisions of the Sundry Civil Appropriation Act, approved July 1st, 1898, having reference to the land grant of this Company.

Very respectfully,
DANIEL S. LAMONT, Vice-president.

The Secretary of the Interior, Washington, D. C.
(Inclosure)

Endorsed on back: J. I. P. A. M.
Dept. of the Interior. July 23 '98.
Acknowledged and Respectfully referred to the Com'r Gen'l Office. Edward M. Dawson, Chief Clerk.
No answer required. File with Nor. Pac. R. R. papers. Marr.
U. S. General Land Office Received July 26, 1898. 74045.
Department of the Interior, Received July 22, 1898. 2972.
Daniel S. Lamont, Vice-President,
200 No. Pac. Ry. Co. July 21/98.
Encloses certified copy of the resolution adopted by the Board of Directors, No. Pac. Ry. Co., formally accepting on the part of said company, provisions of Sundry Civil Appropriation Act, Approved July 1st, 1898, having reference to land grant of N. P. Ry. Co.

Chief Clerk
July 22, 1898
Department of the Interior

F

43/142

1 E
S. S. M.
4-207. S. S. M.
F

Department of the Interior,
General Land Office.

Washington, D. C., May 19, 1906.

I hereby certify that the annexed copies relating to the acceptance by the Northern Pacific Railway Company of the provisions of the Act of July 1, 1898, are true and literal exemplification from the original and the certified copy on file in this office.

In testimony whereof I have hereunto suscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[Seal]

W. A. RICHARDS,
Commissioner of the General Land Office.

201 Endorsed: Complainant's Exhibit K. Filed Dec. 1, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

202 Complainant's Exhibit L.

Northern Pacific Railroad Company,
(Presidents Office)

New York, July 3d, 1882.

Hon. H. M. Teller,
Secretary of the Interior,
Washington, D. C.

Sir: I have the honor to inform you that I have to-day sent to your address by express, the map or plat of the definite location of the Main Line of the Northern Pacific Railroad from a point on the main line of said railroad at its junction with the St. Paul & Duluth Railroad near the right bank of the St. Louis river in the State of Minnesota thence in an easterly direction to a point in Section 15, Township 47 North Range 2 West of the 4th Principal Meridian in the State of Wisconsin, lying and being partly in the State of Minnesota, and partly in the State of Wisconsin.

The map is duly verified by the Chief Engineer and certified by me as the President, of the Company, and I respectfully re-

quest that it be transmitted to the Hon. the Commissioner of the General Land Office for filing in his office and for such necessary and appropriate action thereon as shall be in compliance with law and the practice of the Department.

I beg leave to refer to Section 3 of the Act of Congress, approved July 2, 1864, commonly known as the Charter of the Northern Pacific Railroad Company.

203 I have the honor to be,
Very respectfully,
Your obedt. Servant,
H. WILLARD, President.

Endorsed on the back:

Department of the Interior
General Land Office.
Rec'd July 6, 1882.

M. 2090. L. & R. R. Div. 53118

H. Villard, President,
New York City,
3d July, 1882.

Transmits map of definite location of Nor. Pac. R. R., partly in Minn. & partly in Wisconsin from junction with St. Paul & Duluth in Minn. to a point in Wisconsin.

F 1 paper and map

1 Enc.

1 paper and map— Z. B. S.

Dept. of the Interior,

5 July, 1882,

Respectfully referred to the Com'or Gen'l Land Office.

GEO. M. LOCKWOOD, Chief Clerk.

F.
S. S. M. 4-207 S. S. M.

Department of the Interior,
204 General Land Office,

Washington, D. C., May 19, 1906.

I hereby certify that the annexed copy is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[Seal]

W. A. RICHARDS,
Commissioner of the General Land Office.

Endorsed: Complainant's Exhibit L. Filed Dec. 1, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

Complainant's Exhibit M.

205 S. S. M. 4-207 a.
F

Department of the Interior,
General Land Office,

Washington, D. C., May 19, 1906.

I, W. A. Richards, Commissioner of the General Land Office do hereby certify that the annexed copies are true and literal exemplifications from the originals on file or of record in this office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[Seal]

W. A. RICHARDS,
Commissioner of General Land Office.

J. F. S.
C. M. B.
Ex'd

General Land Office,
May 26th, 1864.

X

Register and Receiver,
Taylor's Falls, Minn.

Ackd.
June
3d 64
G. 38, 266.

Gentlemen: By act appd May 5th, 1864, a grant of land was made to the State of Minnesota to aid in the construction of a Railroad from St. Paul to Lake Superior.

206 The Secretary of the Interior having approved of a withdrawal of lands for said road, you will suspend from pre-emption settlement and sale a body of lands about twenty miles in width as indicated on the enclosed diagram "A" marked "Lake Superior and Mississippi Railroad".

Acknowledged the date of receipt of this.

Very respectfully,
Your obt. Servt.,

J. M. EDMONDS,
Commissioner.

X.

Also to Reg. & Rec. at Duluth, Minn., of same date withdrawing lands for Lake Superior & Mississippi R. Road.

xd.
M. M.
L. E. G.

Department of the Interior,

Washington D. C., Oct. 12th, 1866.

Sir: I enclose herewith for your information and report a letter dated 18th ultimo from the Governor of Minnesota with the map of the Lake Superior and Mississippi Railroad, authorized to be constructed by the Act of Congress approved May 5th, 1864, and the amendatory Act of the Legislature of said State referred to therein.

It appears from the records of this Department, that, in compliance with the recommendation contained in your letter of 6th July last, my predecessor, on the 7th of the same month, extended the time in which said Company
207 were required to file a map of the definite location of their road to the 11th October instant.

The map referred and enclosed herewith, was received at this Department on the 24th ultimo.

The letter with map and certified copy of the Act of the Legislature, you are requested to return with your report thereon.

I am, Sir,

Very respectfully,
Your Ob't Servant,

O. H. BROWNING,

Hon. Jos. S. Wilson,
Com'r Gen. Land Office.

Endorsed on back:
S. 88384.

Hon. Sec. Interior,

Oct. 12/66.

Encloses for the information etc. of this office a letter from the Governor of Minn. covering map of the Lake Superior & Miss. R. R. etc., etc., etc.

Ex'd.
J. F. S.
C.M.B.

Department of the Interior,

General Land Office,

Nov. 2, 1866.

208 Register & Receiver,

Duluth, Minn.

Gentlemen:

Recd. Taylor's Falls, Nov. 15/66 Duluth Nov. 17/66.

Herewith is a diagram showing the line of route, as definitely located, of the Lake Superior and Mississippi Railroad, with the ten, twenty and on the West side of the thirty mile limits indicated thereon, Acts May 5, 1864 & July 13, 1866.

The odd sections within all three of these limits will be withdrawn from sale or location, premption or homestead; except in so far as valid pre-emption claims may have accrued to the same, prior to the withdrawal of May 26, 1864 within the limits therein designated, and prior to the receipt of this order outside of the limits fixed in that withdrawal.

As the Act 1864 reserves from the grant any and all lands theretofore reserved for the purpose of aiding in any object of internal improvement or for any other purpose whatsoever, no reserved lands are subject to the operation of the grant.

You will mark the line of route with the several limits on the township plats in pencil, and you will report the fact of its having been done.

The Railroad Company will be required, first to make their selections from the 10 and 20 mile limits,—if it is then found that a deficiency exists, the same can be made up by selections from the 30 mile limits.

209 This order will take effect from the date of its receipt at your office, and you will advise me of the precise time it may be received by you.

Very Respectfully,
Your Obdt. Servant,

JOS. S. WILSON,
Commissioner.

The even sections within the 10 mile limits are increased in price to $2.50 per acre and will be subject at that rate to settlement and entry under the pre-emption & homestead laws; but no such sections can be entered at private sale until they shall have first been offered at public auction.

JOS. S. WILSON,
Commissioner.

Endorsed: Complainant's Exhibit M. Filed Dec. 1, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

210

Complainant's Exhibit N.

~~Exhibit No.~~_____

List of lands in the district of lands subject to sale at Duluth, Minnesota, outside of the ten and within the twenty mile limits of the reserve to satisfy the grant made to the State of Minnesota, by the Act of Congress approved May 5th, 1864, being "An Act granting public lands in alternate sections to the State of Minnesota to aid in the construction of Lake Superior and Mississippi Railroad, being the lands selected by the agent of the Governor of the State of Minnesota, from the lands of the United States in alternate sections and parts of sections designated by odd numbers, nearest to the tiers of sections within ten sections in width on each side of the railroad "from the City of St. Paul to the head of Lake Superior," and in lieu of the lands in the alternate sections designated by odd numbers, within said ten sections in width which the United States had legally "sold or otherwise appropriated, or to which the rights of preemption have attached."

INDEMNITY LIST NO. 2.

Approved March 25th, 1868.

Copy sent to Governor May 27, 1868.

Copy sent to local office May 27 1868.

Approval noted on tract books May 29, 1868.

North of base line and west of Fourth Principal Meridian, Lake Superior and Mississippi between ten and twenty-mile limits, Duluth District.

RAILROAD LIST.

No.	Parts of Sections.	Sec.	Tp.	R.	Acres.
2	W. ½,	7	46	15	268.89

211

W. ½,	19	"	"	264.81
E. ½ N. W. ¼,	31	"	"	80.
N.W. ¼ N. W. ¼,	"	"	"	24.94
E. ½ S. W. ¼,	"	"	"	80.
S. W. ¼ S. W. ¼,	"	"	"	22.53
W. ½,	"	47	"	270.08
W. ½,	7	51	"	320.72
~~No. Parts of Sections~~	~~Sec.~~	~~Tp.~~	~~R.~~	~~Acres.~~
W. ½ S. E. ¼,	7	51	15	80.
E. ½,	17	"	"	320.
S. E. ¼ N. W. ¼,	"	"	"	40.
E. ½ S. W. ¼,	"	"	"	80.
S. W. ¼ S. W. ¼,	"	"	"	40.
N. E. ¼ N. E. ¼,	19	"	"	40.
S. ½ N. E. ¼,	"	"	"	80.
N. W. ¼,	"	"	"	159.99
N. E. ¼ S. W. ¼,	"	"	"	40.
W. ½ S. W. ¼,	"	"	"	81.80
S. E. ¼,	"	"	"	160.
W. ½ N. E. ¼,	21	"	"	80.
N. W. ¼,	"	"	"	160.
W. ½ S. W. ¼,	"	"	"	80.
W. ½ N. E. ¼,	29	"	"	80.
N. W. ¼,	"	"	"	160.
W. ½ S. W. ¼,	"	"	"	80.
Lots 2, 3, and 4,	31	"	"	139.52
S. E. ¼ N. W. ¼,	31	"	"	40.
N. ½ S. W. ¼,	"	"	"	81.50
All	1	46	16	640.97
All	11	"	"	640.
E. ½,	13	"	"	320.
N. ½ N. W. ¼,	"	"	"	80.
S. E. ¼ N. W. ¼,	"	"	"	40.
E. ½ S. W. ¼,	"	"	"	80.
S. W. ¼ S. W. ¼,	"	"	"	40.
All	15	"	"	640.
N. ½ S. E. ¼,	19	"	"	80.
All	21	"	"	640.
All	23	"	"	640.
All	25	"	"	640.
All	27	"	"	640.

212

All	29	46	16	640.
All	31	"	"	595.51
N. ½,	33	"	"	320.
N. E. ¼ S. W. ¼,	"	"	"	40.
S. ½ S. W. ¼,	"	"	"	80.
N. W. ¼ S. E. ¼,	"	"	"	40.
S. ½ S. E. ¼,	"	"	"	80.
N. ½,	35	"	"	320.
S. W. ¼,	"	"	"	160.
N. ½ S. E. ¼,	"	"	"	80.
S. ½,	25	46	17	320.
E. ½ N. E. ¼,	35	"	"	80.
S. E. ¼,	"	"	"	145.75
Total number of acres,				11,377.01

I, Joseph S. Wilson, commissioner of the General Land Office, do hereby certify that the foregoing is a true and correct list of the tracts of lands selected by the agent of the State of Minnesota, outside of the ten and within the twenty mile limits under the Act of Congress approved May 5th, 1864, entitled "An Act making a grant of lands to the State of Minnesota to aid in the construction of the railroad from Saint Paul to Lake Superior," and the Act amendatory thereof approved July 13, 1866, the said selections being from the lands of the United States in the alternate sections designated by odd numbers, most continguous to the tier of sections within ten sections in width on each side of road "from the City of Saint Paul to the head of Lake Superior," and being in lieu of the land in the alternate sections designated by odd numbers within said ten sections in width on each side of said road, which the United States had legally sold, or to which the right of pre-emption

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had legally attached prior to the period at which the rights of the state inured under said grant, and they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of said Acts of May 5th, 1864, and July 13, 1866, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed at the City of Washington, on the day and year first herein above written.

(Seal) JOSEPH S. WILSON,
Commissioner.

Department of the Interior,
Washington City, March 25th, 1868.

Approved, subject to the conditions and rights above mentioned.

O. H. BROWNING,
Secretary.

DEPARTMENT OF THE INTERIOR,
General Land Office,
Washington, D. C., Oct. 25, 1905.

I hereby certify that the annexed copy of List No. 2 of lands approved for the Lake Superior & Mississippi Railroad Company March 25, 1868, is a true and literal exemplification from the original on file in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed at the City of Washington, on the day and year above written.

(Seal) J. H. FIMPLE,
Acting Commissioner of the General Land Office

Endorsed: Filed Dec. 1st, 1906. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

214 Complainant's Exhibit "O".

"F" 4—207. S. S. M.

Department of the Interior.
General Land Office.

F. C. L.

Washington, D. C., May 19, 1906.

I hereby certify that the annexed copy is a true and literal exemplification of the original on file in this office.

[Seal U. S. General Land Office.] In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

W. A. RICHARDS,
Commissioner of the General Land Office.

215 Ex'd. C. M. B. J. F. S.

Department of the Interior General Land Office.

October 14, 1905.

Whereas, by the Act of Congress, approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound on the Pacific Coast by the Northern Route", and the Joint Resolution of May 31, 1870, there was granted to the Northern Pacific Railroad Company its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and branch to the Pacific Coast "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt through the territories of the United States and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any State, and whenever on the line thereof, the United States have full title not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office"; and

Whereas, it is further provided that "whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of, other lands shall be selected

by said company in lieu thereof, under the direction of
216 the Secretary of the Interior, in alternate sections,
and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections; and

Whereas by said Joint Resolution of May 31, 1870, it is further provided that, "in the event of there not being in any State or Territory in which said main line or branch may be located at the time of the final location thereof, the amount of lands per mile granted by Congress to said company within the limits prescribed by its charter, then said company shall be entitled, under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency on said main line, or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the Act of July two, eighteen hundred and sixty-four; and

Whereas, official statements from the Secretary of the Interior have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the provisions of the fourth section of the first named Act, have reported to him that the said Northern Pacific Railroad and Telegraph Line and Branch excepting that portion between Wallula, Washington and Portland, Oregon, declared forfeited by the Act of September 29, 1890, have been constructed and fully completed and equipped in the manner prescribed by the Act relative thereto, and the same accepted; and

217 Whereas there has been filed in the office of the Secretary of the Interior, evidence showing that the Northern Pacific Railway Company is the lawful successor in interest of the Northern Pacific Railroad Company, as to all lands within the limits of the grant made to the said Northern Pacific Railroad Company, by the Act of July 2, 1864, and all subsequent legislation; and

Whereas a certain tract of land has been selected, under the Acts aforesaid, by the duly authorized agent of said Northern Pacific Railroad Company, now Northern Pacific Railway Company, as shown by his original list approved by the local land officers and now on file in the General Land Office; and

Whereas said tract of land lies coterminous to the con-

structed line of road, and is particularly described as follows, to-wit:

218 North of base line and west of the 4th Principal Meridian, Minn.

Northern Pacific Railway List.

Duluth Dist. Second Indemnity.

Parts of Section	Section.	Town	Range	Acres	Parts of Section	Section	Town	Range	Acres
List	No. 15.	October 17.		1883		Minnesota			
SW¼SE¼	7	N. 54	W. 14	40.00	NW¼NE¼	11	N. 46	W. 4th 16	P. M. 40.00

Railroad Division, Oct. 10, 1905.

We hereby certify that we have examined the foregoing list in connection with the plats and records of this office, and have found the tract therein described is vacant, unappropriated land outside of the thirty (30) mile and within the forty (40) mile limits of the grant made to aid in the construction of the Northern Pacific Railroad, now Northern Pacific Railway, and subject to selection, that the tract designated as basis for said selection was disposed of, or otherwise appropriated by the United States subsequent to the date of the granting act, and prior to the definite location of the road, and has not been used as a basis for other approved selections.

Approved:

W. J. DRUMMOND,
F. C. LORD,

S. S. Marr,
Chief of Division. Examiners.

219 Mineral Division, October 10, 1905.

This certifies that under Sec. 2345 U. S. Rev. Stats. the U. S. Mining laws do not apply to public lands in the State of Minnesota, and that the selection of land herein was made prior to the Saline Act of January 31, 1901.

C. A. HOLLINGSWORTH,
Examiner.

Approved:
H. G. Potter,
Chief of Division.

General Land Office, Division of Swamp Lands.

Washington, D. C., October 11, 1905.

This certifies that the foregoing list, List No. 57, Northern Pacific Railway lands, embracing 40.00 acres, has been care-

fully examined in connection with the swamp land records of this office, and that the same has been found to be free from conflict.

E. H. HUNTER,
Examiner.

Aproved:
Edmond Mallet,
Chief of Division.

Accounts Division.

General Land Office Oct. 12, 1905.

Expense of Survey and office work on lands described in the foregoing list.

Railroad Selections		40.00 acres
Field work,	$1.34	
Office work at 0075 per acre,	.30	
	$1.64	

A. B. WHITE,
Chief of Division.

220 Now, therefore, as it has been found on a careful examination in connection with the authenticated map on file in the General Land Office of the survey of the Northern Pacific Railroad route, that the foregoing land falls within the forty mile lateral limits of said route, and that the said land, so far as the returns to the General Land Office show, is free from conflict, it is hereby recommended that the described tract covering forty acres be approved and carried into patent, as land falling within the grant by the Acts aforesaid and inuring to the said Northern Pacific Railway Company, as successor in interest to the Northern Pacific Railroad Company.

W. A. RICHARDS,
Commissioner, S. S. M.

To the Honorable the Secretary of the Interior.

J.I.P.

Department of the Interior,

Washington, D. C., October 17, 1905.

Approved: covering forty acres.

E. A. HITCHCOCK,
Secretary of the Interior.

Endorsed: Complainant's Exhibit "O". Filed Dec. 1st, 1906. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

221 Complainant's Exhibit P.

Introduced in evidence at page 148, of this Record.

No. 14812. Receiver's Office at Duluth, Minn.,

December, 10, 1898.

Received from Richard B. Jones of St. Louis County, Minn., the sum of One Hundred Dollars and——cents; being in full for the SW 1/4 of SE 1/4 quarter Section No. 7, in Township No. 54, N. of Range No. 14 W. 4th. P. M., containing forty acres and —— hundredths, at $2.50 per acre.

$100.00. J. M. SMITH, Receiver.

$.65c testimony fee received Number of written words, 433. Rate per 100 words, 15 cents March 22, 1898.

Endorsed on face in black ink: $10.00 for T. & S. No. 3377, Dec. 17, 1897.

Endorsed on face in red ink: This receipt is issued under the order of the Secretary of the Interior, dated Feb. 28, 1898, subject to any right the Northern Pacific Railroad Company may have to the lands herein described.

Endorsed on back in red ink: 50298: Office of Register of Deeds, State of Minnesota, County of St. Louis: I hereby certify that the within Instrument was filed in this office for record Oct. 3, 1902, at 10:45 A. M., and was duly recorded in Book D of L. O. R. page 281. A Lofgren, Register of Deeds, by Thos. Clark, Deputy.

Endorsed: Complainant's Exhibit P. Filed Dec. 1, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

222 Complainant's Exhibit Q.

This indenture, Made this 19th day of December, in the year of our Lord one thousand eight hundred and ninety eight between Richard B. Jones and Anna Jones, wife of said Richard B. Jones of Duluth and of the County of St. Louis and State of Minnesota parties of the first part and Minnie Stewart of Duluth and of the County of St. Louis and State of Minnesota party of the second part

Witnesseth, That the said parties of the first part, for and in consideration of the sum of ($250.00), Two Hundred and Fifty Dollars, to them in hand by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents Grant, Bargain, sell, Remise, Release and Convey unto the said party of the second part and to her heirs and assigns

forever, all the following described lot, piece, or parcel of land situate in the County of St. Louis and State of Minnesota, and known and described as follows, to-wit:

The South West Quarter of the South East Quarter (SW 1/4 of SE 1/4) of Sec. Seven (7) in Town Fifty four (54) North of Range Fourteen (14) West 4th P. M., containing forty acres according to the government survey thereof.

To have and to hold the same, Together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part her heirs and assigns, Forever, And the said Richard B. Jones and Anna Jones parties of the first part, for their heirs, executors and administrators, do covenant with the said party of the second part, her heirs and assigns, that they
223 have not made, done, executed or suffered any act or thing whatsoever, whereby the above described premises or any part thereof now or at any time hereafter shall be imperiled, charged or incumbered in any manner whatsoever; and the title to the above granted premises against all persons lawfully claiming the same from, through or under them the said parties of the first part will Forever Warrant and Defend.

In Testimony Whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

[Seal] RICHARD B. JONES,
[Seal] ANNA JONES,

Signed, sealed and delivered
in the presence of
W. H. Smallwood,
E. B. Trenttage.

(Five 10-cent I. R. Stamps duly cancelled).

State of Minnesota,
County of St. Louis—ss.

On this 19th day of December, A. D. 1898, before me, a Notary Public, within and for said County personally appeared Richard B. Jones and Anna Jones, his wife, to me known to be the person described in, and who executed the foregoing and within instrument, and acknowledged that they executed the same as their free act and deed.

W. H. SMALLWOOD,
[Notarial Seal] Notary Public, St. Louis County, Minn.

Endorsements on back: T. B. P. Taxes for the year 1901

on the lands described within paid. L. H. Whipple, County Treasurer, by G. J. M., Asst. Deputy.

Taxes paid and transfer entered this 15th day of Aug. A. D. 1902. O. Halden, County Auditor, By C. S. Raksy.

50299. Office of Register of Deeds, St. Louis County, Minn. I hereby certify that the within Instrument was filed in this office for record on the 3rd day of Oct. A. D. 1902, at 10.45 o'clock A. M. and was duly recorded in Book 195 of Deeds, on page 453. A. Lofgren Register of Deeds, by Thos. Clark, Deputy.

Endorsed: Complainant's Exhibit Q. Filed Dec. 1, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

224 Complainant's Exhibit R.

This Indenture, Made this 22nd day of March, in the year of our Lord one thousand nine hundred and two between Minnie Stewart and Moses Stewart her husband of the County of St. Louis and State of Minnesota parties of the first part, and Herbert H. Hoyt of Duluth of the County of St. Louis and State of Minnesota party of the second part.

Witnesseth, That the said parties of the first part, for and in consideration of the sum of Two Hundred ($200.00) Dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents Grant, Bargain, Sell, Remise, Release and Convey unto the said party of the second part and to his heirs and assigns, forever, all the following described lot, piece, or parcel of land situate in the County of St. Louis and State of Minnesota, and known and described as follows, to-wit:

The South West quarter of the South East quarter (SW 1/4 of SE 1/4) of Sec. Seven (7) in Town Fifty four (54) North of Range Fourteen (14) West 4th containing forty acres according to the government survey thereof.

To have and to hold the same, Together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns, Forever, And the said Minnie Stewart and Moses Stewart her husband parties of the first part, for their heirs, executors and administrators does covenant with the said party of the second part, his heirs and assigns, that they have not made, done, executed or suffered any act or
225 thing whatsoever, whereby the above described premises or any part thereof now or at any time hereafter shall or may be imperiled charged or incumbered in any manner whatsoever; and the title to the above granted premises

against all persons lawfully claiming the same from, through or under them the said parties of the first part will Forever Warrant and Defend.

In testimony whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

[Seal] MINNIE STEWART
[Seal] MOSES STEWART.

Signed, Sealed and Delivered in Presence of
W. D. Underhill,
E. H. Stewart.

State of Minnesota,
County of St. Louis – ss.

On this day of March A. D. 1902, before me, a Notary Public within and for said County, personally appeared Minnie Stewart and Moses Stewart her husband to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

W. UNDERHILL,
Notary Public, St. Louis County, Minn.

Endorsements on back: T. B. P. Taxes for the year 1901 on the lands described within paid. L. H. Whipple, County Treasurer, by G. J. M., Asst. Deputy.

50299. Office of Register of Deeds, County of St. Louis, Minn. I hereby certify that the within Instrument was filed in this office for record on the 3rd day of Oct. A. D. 1902, at 10:45 o'clock A. M. and was duly recorded in Book 195 of Deeds, on page 254. A. Lofgren, Register of Deeds, by Thos. Clark, Deputy.

Taxes paid and transfer entered this 15th day of Aug. 1902. O. Halden, County Auditor, by C. S. Raksy.

Endorsed: Complainant's Exhibit R. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

Complainant's Exhibit T.

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Extract.
From the
Journal of the Senate of the United States.

54th Congress, 1st Session. April 8, 1896, Pages 228—229.

Introduction of Bills and Joint Resolutions.

Mr. Michell, of Oregon, introduced a joint resolution (S. R.

124) to facilitate the reorganization of the Northern Pacific Railroad Company; to secure actual settlers the right to purchase at a price not exceeding $2.50 per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person or association of persons owning, operating, or controlling a parallel or competing railroad; which was read the first and second times by unanimous consent and referred to the Committee on the Judiciary.

Reports of Committees.

April 21, 1896,
Page 253.

Mr. Mitchell, of Oregon, from the Committee on the Judiciary, to whom was referred the joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company, to secure to actual settlers the right to purchase
227 at a price not exceeding $2.50 per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action, control of its railroad to any corporation, company, person, or association of persons owning operating, or controlling a parallel or competing railroad, reported it with amendments and submitted a report (No. 776) thereon.

I, Charles G. Bennett, Secretary of the United States Senate, do hereby certify that the above typewritten paper is a true and authentic copy of extracts from the Journal of the United States Senate for the First Session of the Fifty-fourth Congress relating to Senate Joint Resolution No. 124.

Given under my hand and the seal of the United States Senate this eleventh day of August, A. D. 1906.

[Seal] CHARLES G. BENNETT, Secretary.

Congressional Record—Senate.

54th Congress,
2d Session.

January 23, 1897,
Page 1099.

Order of Business.

The Vice-President (at 12 o'clock and 15 minutes p. m.). The morning business is closed.

Mr. Platt. I suggest that we might go on with the order, although the hour of half past 12 has not been reached.

The Vice-President. Is there objection? The chair hears
228 none, and the Calendar under Rule VIII is in order. The first case will be announced.

Northern Pacific Railroad Company.

The joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company, to secure to actual settlers the right to purchase at a price not exceeding $2.50 per acre the agricultural lands within its grant, and to prohibit said company, or any successor company from giving, by consolidation, sale, or other corporate action, control of its railroad to any corporation, company, person, or association of persons owning, operating, or controlling a parallel or competing railroad, was announced as next in order.

Mr. Gorman. Let the joint resolution go over.

The Presiding Officer. Objection being made, the joint resolution will go over.

I, Charles G. Bennett, Secretary of U. S. Senate, do hereby certify that the foregoing typewritten paper is a correct and authentic copy of extracts from the Congressional Record for the Second Session of the Fifty-fourth Congress relating to the consideration in the United States Senate of the joint resolution S. R. 124.

Given under my hand and the seal of the United States Senate this thirteenth day of August, A. D., Nineteen hundred and six.

[Seal] CHARLES G. BENNETT, Secretary.

Endorsed: Complainant's Exhibit T. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

229 Defendant's Exhibits.

Defendant's Exhibit No. 7.

Circuit Court of the United States—Eighth Judicial Circuit—District of Minnesota, Third Division.

The Farmer's Loan and Trust Company, Complainant,

vs.

Northern Pacific Railroad Company, Phillip B. Winston, George R. Sheldon, William S. P. Prentice, William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Co., et al., Defendants.

May 5, 1899.

This cause coming on to be heard on this day, upon all the records and proceedings herein, and upon the petition of Edwin H. McHenry and Frank G. Bigelow, receivers herein, filed on this day; and it appearing that an order has been entered in a certain proceeding between the same parties in the Circuit

Court of the United States for the Eastern District of Wisconsin, to which this proceeding is ancillary, in the following form, namely:

Circuit Court of the United States, Eastern District of Wisconsin.

230 The Farmers' Loan and Trust Company, Complainant,

against

Northern Pacific Railroad Company, Phillip B. Winston, George R. Sheldon, William S. P. Prentice and William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Co., et al., Defendants.

April 27th, 1899.

This cause coming on this day to be heard upon all the record and proceedings herein, and upon the petition of Edwin H. McHenry and Frank G. Bigelow, the Receivers herein, filed on September 25, 1897, and no one opposing, it is thereupon

Ordered that the prayer of said petition be and the same hereby is granted, and that all the lands granted by Congress to aid in construction and equipment of the railroads of the defendant, the Northern Pacific Railroad Company, and all rights of said defendant under the several land grants made to it by Congress in any such lands lying within the State of Minnesota and State of North Dakota east of the Missouri River, shall be sold at public sale to the highest bidders, in the following manner:

I. Such sale shall be made by Alfred L. Cary, Esq., hereby appointed Special Master for that purpose.

II. All of said lands for which letters patent have been issued to said defendant, the Northern Pacific Railroad Company, and the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said company, shall be sold in single sections or subdivisions thereof at the following places:

(a) All of said lands which lie within the State of North Dakota shall be sold at the United States government building in the City of Fargo, in Cass County in said State.

231 (b) All of said lands which lie within the State of Minnesota shall be sold at the United States government building in the City of St. Paul, in Ramsey County in said State.

III. All lands for which patents have not issued, and which

have not been selected and certified to said company, but to which said Northern Pacific Railroad Company is entitled under said grants of Congress, and all rights of said Northern Pacific Railroad Company to receive from the United States any lands which have not been certified or patented to said railroad company, whether under grant expressed in the Act of Congress of July, 1864, or under any subsequent grant, by way of indemnity or otherwise, to said company, together with all the right, title, interest and claim in or to any such lands, and all its rights to receive from the United States patents therefor; and also all right, title, interest and equity in and to any other lands to which said Northern Pacific Railroad Company may be entitled, and which may have accrued or shall hereafter accrue to it under any of said land grants; and also all right, title, equity and interest in and to any lands covered by or included in any of said land grants and not hereinbefore specified, shall be sold as follows:

(a) As to all of such lands and rights in respect of lands situated within the State of North Dakota, such sale shall be made in one parcel at the United States government building, in Fargo in said State.

(b) As to all such lands, and rights in respect of lands situated within the State of Minnesota, such sale shall be made in one parcel at the United States government building in St. Paul in said State.

IV. Such sales shall respectively be made upon a
232 day or days to be fixed by said Special Master and notice of the time and place of sale, describing briefly the property and rights to be sold, and referring to this order, shall be published as follows:

(a) Sixty days' previous notice of the time and place of the sale of the patented lands and of the said unpatented lands and rights to lands within the State of North Dakota, shall be given by the Special Master by publishing the same once at least sixty days preceding the day of sale, and also at least once in each week, beginning on any day of the week, for the term of six successive weeks preceding the day of sale, in a newspaper of general circulation published in each of the following places in North Dakota, to-wit:
Fargo and Bismark.

(b) Sixty days' previous notice of the time and place of sale of the patented lands and of the said unpatented lands and rights to lands within the State of Minnesota, shall be given by the Special Master by publishing the same once at least sixty days preceding the day of sale, and also at least once in each

week beginning on any day of the week, for the term of six successive weeks preceding the day of sale, in a newspaper of general circulation published in each of the following places in the State of Minnesota, to-wit:

St. Paul, Duluth, Brainerd and Moorehead.

The Special Master may adjourn or postpone, by public announcement, said sales or any of them as to any property to be sold thereat; and without any further notice may proceed with such sale or sales on any day to which the same may be adjourned.

V. The Special Master shall receive no bid from any one offering to bid for said patented lands, or lands selected and certified but not patented, who shall not first deposit with him, as a pledge that he will make good his bid in case of acceptance, the sum of ten dollars for each section of such
233 lands for which such bidder desires to bid, in money or by a certified check upon any national bank or trust company in the City of New York or in the City of St. Paul, Minnesota.

Upon the acceptance of any bid for any of said patented land, or lands, selected and certified but not patented, the person to whom the same shall have been struck off shall deposit with the Special Master ten per cent of the total amount of his bid for such lands, either in cash or in a certified check upon any national bank or trust company in the City of New York, or in the City of St. Paul, Minnesota.

VI. The Special Master shall receive no bid from any one offering to bid for said unpatented lands and rights who shall not first deposit with him, as a pledge that he will make good his bid in case of acceptance, a sum equal to five per cent of the amount of his bid, in money or in a certified check upon a national bank or trust company in the City of New York or in the City of St. Paul, Minnesota.

Upon the acceptance of any bid for said unpatented lands and rights, the bidder shall forthwith deposit with said Special Master a sum equal to ten per cent of the amount of his bid, in money or in a certified check on any national bank or trust company in the City of New York or in the City of St. Paul, Minnesota.

VII. Upon the confirmation of any sale by the Court, the purchaser shall make such further payment or payments in cash on account of his bid as the Court may from time to time direct. The purchaser of any parcel may satisfy and make good any part of his bid not required to be paid in cash, by execut-

ing and delivering to the said Master an assignment of any claim against said Northern Pacific Railroad Company which shall have been, at the time of such assignment, finally allowed by the Court in this suit and of which such
234 purchaser shall then be the owner; and such purchaser shall be credited therefor, on account of his bid, with such sums as would be payable on such claims out of the purchase price of all the lands if the whole amount thereof had been paid in cash. If the credit to which the owner of any claim so assigned would be entitled by reason thereof shall exceed the amount due from him upon such bid in excess of the amount required to be paid in cash, then such assignment to said Master may be of such amount out of the total of the said claim as may be necessary to make up the amount so due on such bid or bids; and the right of such purchaser in respect of the balance due on such claim or claims shall not be affected thereby.

All such assignments shall be filed in the office of the Clerk of this Court by said Master, with his report, and shall, if the said report and sales be confirmed, operate to extinguish wholly or pro tanto, as the case may be, the claim or claims of such purchaser so assigned.

VIII. All sums of money received by the Special Master shall forthwith be deposited with the Clerk of this Court subject to the order of this Court.

In case any bidder for any of said parcels shall fail to make the deposit required therefor, the lands or rights struck off to him shall then and there be offered for sale without further notice or advertisement.

Any cash which any successful bidder may previously have deposited as a pledge that he would make good his bid, shall be received on account of the amount required to be paid by him on the acceptance of his bid.

By the Court,

JAS. C. JENKINS,
Circuit Judge.

And all the parties to this action appearing and con-
235 senting thereto, and no reason appearing to the Court why said petition should not be granted,

It Is Thereupon Ordered that the said order of the Circuit Court of the United States for the Eastern District of Wisconsin, entered on the 27th day of April, 1899, be and the same is hereby adopted and in all things made the order of this court herein.

WALTER H. SANBORN,
Circuit Judge.

St. Paul, May 5, 1899.

Endorsed: Defendant's Exhibit No. 7. Filed Dec. 1, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

236 Defendant's Exhibit No. 8.

Circuit Court of the United States.

District of Minnesota, Third Division.

The Farmers' Loan and Trust Company, Complainant,

vs.

Northern Pacific Railroad Company, Phillip B. Winston, George R. Sheldon, William S. P. Prentice, William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Co., Defendants.

June 5, 1899.

This cause coming on to be heard on this day upon all the records and proceedings herein, and upon the petition of Edwin H. McHenry and Frank G. Bigelow, receivers herein, filed on this day: and it appearing that an order has been entered in a certain proceeding between the same parties in the Circuit Court of the United States for the Eastern District of Wisconsin, to which this proceeding is ancillary, in the following, form, namely:

United States Circuit Court,
Eastern District of Wisconsin.

The Farmers' Loan and Trust Company, Complainant,

vs.

237 Northern Pacific Railroad Company, et al., Defendants.

May 25, 1899.

The decree entered herein and dated April 27, 1899, authorizing sale of lands east of Missouri River in Minnesota and North Dakota, is hereby vacated and set aside.

Enter. J. G. J. By the Court.

Circuit Court of the United States, Eastern District of Wisconsin.

The Farmer's Loan and Trust Company, Complainant,

vs.

Northern Pacific Railroad Company, Phillip B. Winston, George R. Sheldon, William S. P. Prentice and William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Co., et al., Defendants.

May 25th, 1899.

This cause coming on this day to be heard upon all the record and proceedings herein, and upon the petition of Edwin H. McHenry and Frank G. Bigelow, the Receivers herein, filed on September 25, 1897, and no one opposing, it is thereupon

Ordered and decreed that the prayer of said petition be and the same is granted, and that all the lands granted by Congress to aid in construction and equipment of the railroads of the defendant, the Northern Pacific Railroad Company, and all rights of said defendant under the several land grants made
238 to it by Congress in any such lands lying within the the State of Minnesota and State of North Dakota east of the Misouri River, shall be sold at public sale to the highest bidders, in the following manner:

I. Such sale shall be made by Alfred L. Cary, Esq., hereby appointed Special Master for that purpose who is hereby required to report to the Court his doings hereunder.

II. All of the said lands for which letters patent have issued to said defendant Northern Pacific Railroad Company, and the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said company, shall be sold in single sections, or subdivisions thereof, and all lands for which patents have not issued, and which have not been selected by and certified to said company, but to which said Northern Pacific Railroad Company is entitled under said grants of Congress and all rights of said Northern Pacific Railroad Company to receive from the United States any lands which have not been certified or patented to said railroad company, whether under the grant expressed in the Act of Congress of July 2, 1864, or under any subsequent grant, by way of indemnity or otherwise, to said company, together with all the right, title, interest and claim in or to any such lands, and all its rights to receive from the United States patents therefor; and also all right, title, interest and equity in and to any other lands to which said Northern Pacific Railroad Company may be entitled, and which may have [accured] or shall hereafter [accure] to it under any of said land grants; and also all right, title, equity and interest in and to any lands covered by or included in any of said land grants and not hereinbefore specified, shall be sold in one parcel as to such lands and rights in each county, at the following places:

239 (a) Minnesota:

1. All of said lands and rights to lands within the County of Pine, in the State of Minnesota, shall be sold at the court house of said county at Pine City.

2. All of said lands and rights to lands within the County of St. Louis, in the State of Minnesota, shall be sold at the court house of said county at Duluth.

3. All of said lands and rights to lands within the County of Lake, in the State of Minnesota, shall be sold at the court house of said county at Two Harbors.

4. All of said lands and rights to lands within the County of Itasca, in the State of Minnesota, shall be sold at the court house of said county at Grand Rapids.

5. All of said lands and rights to lands within the County of Beltrami, in the State of Minnesota, shall be sold at the court house of said county at Bemidji.

6. All of said lands and rights to lands within the County of Cass, in the State of Minnesota, shall be sold at the court house of said county at Walker.

7. All of said lands and rights to lands within the County of Hubbard, in the State of Minnesota, shall be sold at the court house of said county at Park Rapids.

8. All of said lands and rights to lands within the County of Wadena, in the State of Minnesota, shall be sold at the court house of said county at Wadena.

9. All of said lands and rights to lands within the County of Todd, in the State of Minnesota, shall be sold at the court house of said county at Long Prairie.

240 10. All of said lands and rights to lands within the County of Douglas, in the State of Minnesota, shall be sold at the court house of said county at Alexandria.

11. All of said lands and rights to lands within the County of Grant, in the State of Minnesota, shall be sold at the court house of said county at Elbow Lake.

12. All of said lands and rights to lands within the County of Otter Tail, in the State of Minnesota, shall be sold at the court house of said county at Fergus Falls.

13. All of said lands and rights to lands within the County of Wilkin, in the State of Minnesota, shall be sold at the court house of said county at Breckinbridge.

14. All of said lands and rights to lands within the County of Clay, in the State of Minnesota, shall be sold at the court house of said county at Moorhead.

15. All of said lands and rights to lands within the County

of Norman, in the State of Minnesota, shall be sold at the court house of said county at Ada.

16. All of said lands and rights to lands within the county of Becker, in the State of Minnesota, shall be sold at the court house of said county at Detroit.

17. All of said lands and rights to lands within the County of Crow Wing, in the State of Minnesota, shall be sold at the court house of said county at Brainerd.

18. All of said lands and rights to lands within the county of Aitkin, in the State of Minnesota, shall be sold at the court house of said county at Aitkin.

19. All of said lands and rights to lands within the County of Morrison, in the State of Minnesota, shall be sold at
241 the court house of said county at Little Falls.

20. All of said lands and rights to lands within the County of Mills Lacs, in the State of Minnesota, shall be sold at the court house of said county at Princeton.

21. All of said lands and rights to lands within the County of Carlton, in the State of Minnesota, shall be sold at the court house of said county at Carlton.

(b) North Dakota:

1. All of said lands and rights to lands within the County of Dickey, in the State of North Dakota, shall be sold at the court house of said county, at Ellendale.

2. All of said lands and rights to lands within the County of Richland, in the State of North Dakota, shall be sold at the court house of said county at Wahpeton.

3. All of said lands and rights to lands within the County of Traill, in the State of North Dakota, shall be sold at the court house of said county at Hillsboro.

4. All of said lands and rights to lands within the County of Cass, in the State of North Dakota, shall be sold at the court house of said county at Fargo.

5. All of said lands and rights within the County of Ransom, in the State of North Dakota, shall be sold at the court house of said county at Lisbon.

6. All of said lands and rights to lands within the County of La Moure, in the State of North Dakota, shall be sold at the court house of said county at La Moure.

7. All of said lands and rights to lands within the County

of Steele, in the State of North Dakota, shall be sold at the court house of said county at Sherbrooke.

242 8. All of said lands and rights to lands within the County of Barnes, in the State of North Dakota, shall be sold at the court house of said county at Valley City.

9. All of said lands and rights to lands within the County of Griggs, in the State of North Dakota, shall be sold at the court house of said county at Cooperstown.

10. All of said lands and rights to lands within the County of Stutsman, in the State of North Dakota, shall be sold at the court house of said county at Jamestown.

11. All of said lands and rights to lands within the County of Foster, in the State of North Dakota, shall be sold at the court house of said county at Carrington.

12. All of said lands and rights to lands within the County of Wells, in the State of North Dakota, shall be sold at the court house of said county at Fessenden.

13. All of said lands and rights to lands within the County of Eddy, in the State of North Dakota, shall be sold at the court house of said county at New Rockford.

14. All of said lands and rights to lands within the County of Kidder, in the State of North Dakota, shall be sold at the court house of said county at Steele.

15. All of said lands and rights to lands within the County of Burleigh, in the State of North Dakota, shall be sold at the court house of said county at Bismarck.

16. All of said lands and rights to lands within the County of McLean, in the State of North Dakota, shall be sold at the court house of said county at Washburn.

17. All of said lands and rights to lands within the County of Sargent, in the State of North Dakota, shall be sold at the court house of said county at Forman.

243 18. All of said lands and rights to lands within the County of Logan, in the State of North Dakota, shall be sold at the court house of said county at King.

19. All of said lands and rights to lands within the County of Emmons, in the State of North Dakota, shall be sold at the court house of said county at Linton.

20. All of said lands and rights to lands within the County of McIntosh in the State of North Dakota, shall be sold at the court house of said county, at Ashley.

The Receivers are hereby required to file schedules showing the lands and rights to be sold hereunder with the clerk of this Court, and with the clerks of the United States Circuit Courts for the Districts of Minnesota and North Dakota, respectively, at least thirty (30) days before the date of the first sale to be made hereunder.

III. Such sales shall, respectively, be made upon a day or days to be fixed by said Special Master, and notice of the times and places of said sales, describing the property and rights to be sold and referring to this decree, shall be published respectively once a week for at least four weeks prior to such sales, respectively, in a newspaper printed, regularly issued and having a general circulation in the county and state where said sales, respectively are to be made as hereinbefore provided.

The Special Master may adjourn or postpone, by public announcement, said sales or any of them as to any property to be sold thereat; and without any further notice may proceed with such sale or sales on any day to which the same may be adjourned.

IV. The Special Master shall receive no bid from any one offering to bid for said patented lands, or lands selected and certified but not patented, who shall not first de-
244 posit with him, as a pledge that he will make good his bid in case of acceptance, the sum of ten dollars for each section of such lands for which such bidder desires to bid, in money or by a certified check upon any national bank or trust company in the city of New York or in the City of St. Paul, Minnesota.

Upon the acceptance of any bid for any of said patented lands, or lands selected and certified but not patented, the person to whom the same shall have been struck off shall deposit with the Special Master ten per cent of the total amount of his bid for such lands, either in cash or in a certified check upon any national bank or trust company in the City of New York or in the City of St. Paul, Minnesota.

V. The Special Master shall receive no bid from any one offering to bid for said unpatented lands and rights who shall not first deposit with him, as a pledge that he will make good his bid in case of acceptance, a sum equal to five per cent of the amount of his bid, in money or in a certified check upon a national bank or trust company in the City of New York or in the City of St. Paul, Minnesota.

Upon the acceptance of any bid for said unpatented lands

and rights, the bidder shall forthwith deposit with said Special Master a sum equal to ten per cent of the amount of his bid, in money or in a certified check on any national bank or trust company in the City of New York or in the City of St. Paul, Minnesota.

VI. Upon the confirmation of any sale by the Court, the purchaser shall make such further payment or payments in cash on account of his bid as the Court may from time to time direct. The purchaser of any parcel may satisfy and make good any part of his bid not required to be paid in cash, by executing and delivering to the said Master an assignment of any claim against said Northern Pacific Railroad Company
which shall have been, at the time of such assignment,
245 finally allowed by the Court in this suit, and of
which such purchaser shall then be the owner; and such purchaser shall be credited, therefor, on account of his bid, with such sums as would be payable on such claims out of the purchase price of all the lands if the whole amount thereof had been paid in cash. If the credit to which the owner of any claim so assigned would be entitled by reason thereof shall exceed the amount due from him upon such bid in excess of the amount required to be paid in cash then such assignment to said master may be of such amount out of the total of the said claim as may be necessary to make up the amount so due on such bid or bids; and the right of such purchaser in respect of the balance due on such claim or claims shall not be affected thereby.

All such assignments shall be filed in the office of the clerk of this Court by said Master, with his report, and shall, if the said report and sales be confirmed operate to extinguish wholly or pro tanto, as the case may be, the claim or claims, of such purchaser so assigned.

VII. All sums of money received by the Special Master shall forthwith be deposited with the clerk of the Court subject to the order of this Court.

In case any bidder for any of said parcels fail to make the deposit therfor, the lands or rights struck off to him shall then and there be offered for sale without further notice or advertisement.

Any cash which any successful bidder may previously have deposited as pledge that he would make good his bid, shall be received on account of the amount required to be paid by him on the acceptance of his bid.

By the Court,

246 (Signed) JAS. G. JENKINS,
Circuit Judge.

and a certified copy of said order having been filed herein, and all the parties to this action appearing and consenting thereto and no reason appearing to the court why said petition should not be granted, it is thereupon

Ordered that the said order of the Circuit Court of the United States for the Eastern District of Wisconsin, entered on the 25th day of May, 1899, be and the same is hereby adopted and in all things made the order of this court herein.

WALTER H. SANBORN,
Circuit Judge.

Endorsed: Defendant's Exhibit No. 8. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

247 Defendant's Exhibit No. 9.

Circuit Court of the United States,
District of Minnesota.

The Farmers' Loan and Trust Company, Complainant,
vs.
Northern Pacific Railroad Company, Phillip B. Winston, George R. Sheldon, William S. P. Prentice, and William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Co., et al., Defendants.

To the Honorable the Judges of said Court in Equity Sitting:

May 25th, 1899, a certain decree of sale was entered in a certain cause in equity pending in the Circuit Court of the United States for The Eastern District of Wisconsin between the parties above named, the execution whereof, in certain respects, was confided to Alfred L. Cary, as Special Master, June 5th, 1899, a decree ancillary to that above mentioned was entered in a like cause between the same parties pending in each of the following Circuit Courts of the United States, viz., that for the District of Minnesota and that for the District of North Dakota. June 8th, 1899, said Circuit Court of the United States for the Eastern District of Wisconsin entered a decree in the same cause pending therein correcting its said decree of May 25th, 1899. Decrees ancillary to that last mentioned, and correcting respectively the said ancillary decrees of June 5th, 1899, were entered respectively as follows: In the said cause

248 in the Circuit Court of the United States for the District of Minnesota on the 9th day of June 1899, and in the said cause in the Circuit Court of the United States for the District of North Dakota on the 10th day of June, 1899.

Pursuant to said decrees, I, the said Special Master, do report as follows:

First. Schedules showing the lands and rights to be sold under said decrees were filed respectively as follows: With the clerk of the United States Circuit Court for the Eastern District of Wisconsin, at his office in the City of Milwaukee, in said district, on the 6th day of June, 1899: With the clerk of the United States Circuit Court for the District of Minnesota, at his office in the City of St. Paul, in said district, on the 8th day of June, 1899; and with the clerk of the United States Circuit Court for the District of North Dakota, at his office in the City of Fargo, in said district, on the 9th day of June, 1899. Said schedules so filed described the said lands and rights in the State of Minnesota as they are described in the schedules hereto annexed, numbered from "A1" to "A21" both inclusive, and the said lands and rights in the State of North Dakota, as they are described in the schedules annexed to my report of sales under said decrees to the said Circuit Court of the United States for the District of North Dakota numbered from "B1" to "B20", both inclusive.

Affidavits proving that said schedules were filed as above stated are hereto annexed and made part hereof.

Second. Schedules showing the lands and rights to be sold under said decrees within the State of Minnesota, as they are described in the schedules hereto annexed, numbered from "A1" to "A21" both inclusive, were deposited and left for public inspection prior to June 16th, 1899, in each of the following passenger stations of the Northern Pacific Railroad Company, to-wit: At St. Paul, Duluth, Brainerd and Moorehead
249 in said State of Minnesota.

Affidavits proving that said schedules were deposited and left as above stated are hereto annexed and made part hereof.

Third. Pursuant to the authority vested in me by said decrees, I fixed the times of the sales in said State of Minnesota to be made pursuant to said decrees respectively as follows:

1. The sale of lands and rights to lands within the County of Pine on the 17th day of July, 1899, at eleven o'clock A. M.

2. The sale of lands and rights to lands within the County of St. Louis, on the 17th day of July, 1899, at four o'clock P. M.

3. The sale of lands and rights to lands within the County of Lake, on the 18th day of July, 1899, at nine o'clock A. M.

4. The sale of lands and rights to lands within the County of Itasca, on the 18th day of July, 1899, at four o'clock P. M.

5. The sale of lands and rights to lands within the County of Beltrami, on the 19th day of July, 1899, at nine o'clock, A. M.

6. The sale of lands and rights to lands within the County of Cass, on the 19th day of July, 1899, at 12 o'clock noon.

7. The sale of lands and rights to lands within the County of Hubbard, on the 19th day of July, 1899, at three o'clock, P. M.

8. The sale of lands and rights to lands within the County of Wadena, on the 20th day of July, 1899, at nine o'clock A. M.

9. The sale of lands and rights to lands within the County of Todd, on the 20th day of July, 1899, at one o'clock P. M.

10. The sale of lands and rights to lands within the County of Douglas, on the 20th day of July, 1899, at five o'clock P. M.

11. The sale of lands and rights to lands within the County of Grant, on the 21st day of July, 1899, at nine o'clock A. M.

12. The sale of lands and rights to lands within the
250 County of Otter Tail, on the 21st day of July, 1899, at three o'clock P. M.

13. The sale of lands and rights to lands within the County of Wilken, on the 24th day of July, 1899, at nine o'clock A. M.

14. The sale of lands and rights to lands within the County of Clay, on the 25th day of July, 1899, at eleven o'clock A. M.

15. The sale of lands and rights to lands within the County of Norman, on the 25th day of July, 1899, at four o'clock P. M.

16. The sale of lands and rights to lands within the County of Becker, on the 4th day of August, 1899, at nine o'clock A. M.

17. The sale of lands and rights to land within the County of Crow Wing, on the 4th day of August, 1899, at two o'clock P. M.

18. The sale of lands and rights to lands within the County of Aitkin, on the 4th day of August, 1899, at four o'clock P. M.

19. The sale of lands and rights to lands within the County of Morrison, on the 5th day of August, 1899, at nine o'clock, A. M.

20. The sale of lands and rights to lands within the County of Mille Lacs, on the 5th day of August, 1899, at three o'clock P. M.

21. The sale of lands and rights to lands within the County of Carlton, on the 17th day of July, 1899, at two o'clock P. M.

St. Louis County.

Seventh. That I caused notice of the time and place of sale within the County of St. Louis in said State of Minnesota, of certain property described in said decrees, namely, all the lands within the said County of St. Louis, granted by Congress to aid in the construction and equipment of the railroads of said Northern Pacific Railroad Company, and all rights of said company under the several land grants made to it by
251 Congress, in any such lands lying within said County of St. Louis, describing the property and rights to be sold and referring to said decrees, to be published once a week for at least four weeks prior to the 17th day of July, 1899, that being the day of sale within said County of St. Louis specified in said notice, in a newspaper printed, regularly issued and having a general circulation in said County of St. Louis and State of Minnesota.

An affidavit proving the said publication of said notice and specifying the newspaper wherein such publication were made is hereto annexed and made part hereof, and attached to said affidavit is a printed copy of said notice.

That prior to the 16th day of June, 1899, I caused a schedule of the lands within said County of St. Louis, so to be sold under said decrees, to be deposited and left for public inspection in the office of the Clerk of the District Court for said county.

An affidavit proving that said schedule was deposited and left as above stated is hereto annexed and made part hereof.

Eighth. That I attended at the time and place of sale within said County of St. Louis, specified in said notice, to-wit: On the 17th day of July, 1899, at four o'clock P. M., at the Court House in Duluth, St. Louis County, in said State of Minnesota, and then and there, pursuant to said decrees, offered at public sale the lands described in Schedule "A2" hereto annexed and made part hereof, except those represented by "Item number" 390 in said schedule, which said offers of said lands were in single sections or subdivisions thereof, as represented by each "Item number", in said schedule, except said number 390.

That thereupon the person whose name appears in said schedule "A2", under the head of "Name of successful bidder and purchaser" opposite each "Item number," de-
252 posited with me the sum of ten dollars for the privilege of bidding upon the land described in said sche-

dule opposite said "Item number," and thereupon such person bid for said land the sum set opposite thereto under the head of "Amount at which struck off," and such land was struck off by me to such person for the sum so bid, he being the highest and best bidder therefor and that being the highest and best bid made for such land. That upon my acceptance of each such bid (there was a separate sale of the land represented by each "Item number" in said schedule), the said successful bidder made a further deposit with me, which, added to such preliminary deposit, made ten per cent of the amount of each of such bids, which such deposits, both "preliminary" and "second", are stated in said schedule "A2" under the heads respectively designed therefor and opposite the lands and bids with respect to which they were made. The date of sale of the land covered by each such "Item number," is shown in said schedule under the head of "Date of Master's Sale," such date being either the date specified in said notice of sale or an adjournment duly made by me therefrom. All such sales were made at the place in said St. Louis County designated in said notice of sale.

The amounts for which the lands described in said Schedule "A2" except those represented by "Item number" 390, were struck off and sold aggregate $116,700.00

The said deposits made by the successful bidders and purchasers for all such lands aggregate as follows:

Preliminary deposits $3,890.00
Second deposits $7,780.00

$11,670.00

Aggregate amount yet unpaid on such sales.....$105,030.00

Such deposits, "preliminary" and "second", were of the following character:

253 In money ..... $.....
By certified checks upon National Banks or Trust Companies in the City of St. Paul, Minnesota $11,670.00
By certified checks upon National Banks or Trust Companies in the City of New York..... $.....

That Schedule "C2", hereto annexed and made part hereof contains a list of the unsuccessful bidders who made preliminary deposits with me as such Special Master at the said sale of lands described in said Schedule "A2," showing the date and amount deposited by each, the lands as to which each deposit was made by reference to "Item number" in said Sched-

ule "A2," and the date that each such deposit was returned by me to the depositor.

Ninth. That immediately after the conclusion of the said sales of land above reported and at the same place at which such sales were made, being the place in the said County of St. Louis designated in said notice of sale, and pursuant to said decrees, I offered for sale at public auction as one parcel all the lands, property and rights particularly described in said Schedule "A2" and represented by "Item number" 390 thereof.

That thereupon the Northern Pacific Railway Company offered to and did bid for said lands, property, and rights, the sum of one thousand dollars, and with such offer and bid deposited with me fifty dollars by a certified check upon the First National Bank of St. Paul, of the City of St. Paul, Minnesota.

That no other offers to bid for the said lands, property and rights described in said Schedule "A2" and represented by said "Item number" 390 thereof, were made and no other deposits were tendered for the privilege of bidding therefor, although ample opportunity was given for such offers and tenders.

That I thereupon struck off said lands, property and
254 rights to the said Northern Pacific Railway Company, it being the only bidder, and that being the only bid therefor.

That thereupon the said Northern Pacific Railway Company upon my acceptance of its said bid for said lands, property and rights described in said Schedule "A2" and represented by said "Item number" 390 thereof, made a further deposit with me of fifty dollars by a certified check upon the First National Bank of St. Paul.

The details of said last reported sale, as above given, are contained in said Schedule "A2" oppposite to and in connection with "Item number" 390 thereof.

Sixty-sixth. That I caused notice of the time and place of each of the sales hereinbefore reported to be published once a week for at least four weeks prior to the dates fixed by me for said sales respectively as hereinbefore reported in The Daily Pioneer Press, a newspaper printed, regularly issued, and having a general circulation in the City of St. Paul, County of Ramsey, and State of Minnesota, which said notice so published referred to said decrees and described the property and rights to be sold at each of said sales.

An affidavit proving the said publications of said notice is hereto annexed and made part hereof, and attached to said affidavit is a printed copy of said notice.

Sixty-seventh: All the foregoing sales with respect to the lands heretofore contracted to be sold by the Northern Pacific Railroad Company, or by its Receivers, were made subject to the rights of the purchasers under such contracts.

All of which is respectfully submitted.

Dated, August 24th, 1899.

255 Alfred L. Cary, Special Master.

(Here follow affidavits of the Clerks of the United States Circuit Courts for Eastern District of Wisconsin, District of Minnesota, and District of North Dakota, setting forth that schedules of the lands and rights to be sold by the Special Master, pursuant to the decree of May 25, 1899, were duly filed in their respective offices, and also the other affidavits and the schedules mentioned in the foregoing report of sale.)

Recapitulation.

Counties	Payments by successful bidders.		
	Amount at which struck off	Preliminary Deposit	Second Deposit
Pine	$6000	$550	50
St. Louis	117700	3940	7830
Lake	12600	630	630
Itasca	14400	1390	50
Beltrami	2500	200	50
Cass	50100	4960	50
Hubbard	14200	1070	50
Wadena	21700	2120	50
Todd	57000	1780	3920
Douglas	13000	650	650
Grant	2750	100	175
Otter Tail	116950	5830	5865
Wilkin	18600	930	930
Clay	64000	3200	3200
Norman	63950	2280	1145
Becker	58800	2940	2940
Crow Wing	92000	4600	4600
Aitkin	98200	4910	4910
Morrison	6100	560	50
Mille Lacs	9300	880	50
Carlton	1000	50	50
Grand Totals	837850	43570	40215

Endorsed: Filed August 26, 1899. Henry D. Lang, Clerk.

Endorsed: Defendant's Exhibit No. 9. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

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LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp. North	R. West	Area	Numbered Contract
1	E½, NW¼ & S½ SW¼	3	52	12	568.80	
2	E½ NE¼, SW¼ NE¼, SW¼ NW¼ & N½ SE¼	5	52	12	243.17	
3	SW¼ NE¼, E½ W½, SW¼ SW¼ W½ SE¼ & SE¼ SE¼	7	52	12	360.72	
4	E½ & S½ SW¼	9	52	12	400	
5	W½ & SE¼	15	52	12	480	
6	N½, N½ SE¼ & SW¼ SE¼	17	52	12	440	
7	NW¼ NW¼	27	52	12	40	
8	SW¼	29	52	12	160	
9	NE¼	31	52	12	160	
10	N½, NE¼ SW¼ & W½ SE¼	1	53	12	439.14	
11	NW¼ NE¼, N½ NW¼, SE¼ NW¼, SE¼ SW¼ & SE¼	3	53	12	359.04	
12	S½ NE¼, NW¼ & SE¼	5	53	12	398.31	
13	S½ NE¼, N½ S½, SE¼ SW¼, & SW¼ SE¼	7	53	12	322.18	
14	E½ NE¼, W½ NW¼, NW¼ SW¼ & NW¼ SE¼	11	53	12	240	
15	E½ NE¼, SW¼ NE¼ & SE¼	13	53	12	280	
16	SE¼ SW¼ & SE¼	17	53	12	200	
17	NW¼ NE¼	21	53	12	40	
18	E½ NE¼, NW¼ NE¼ & SE¼ SW¼	23	53	12	160	
19	SE¼ SW¼, SW¼ SE¼, & E½ SE¼	25	53	12	160	
20	NW¼ NW¼ & SE¼ SW¼	27	53	12	80	
21	NE¼ SW¼	29	53	12	40	
22	SW¼ NE¼, SE¼ NW¼, SW¼ W½ SE¼ & SE¼ SE¼	31	53	12	363.99	
23	W½ NE¼, E½ NW¼, W½ SW¼, SE¼ SW¼ & SE¼	33	53	12	440	
24	SE¼ NE¼ & SE¼	35	53	12	200	
25	All, less R-W 12 acres	1	54	12	637.20	
26	Lots 2, 3, 4, 5, 7 & SW¼ NW¼	3	54	12	209.66	
27	SW¼ NW¼, NE¼ SW¼, lots 5, 7, 8 & 9	5	54	12	233.05	
28	NE¼ SW¼, Lots 3, 4, 7, 8 & 10	7	54	12	250.70	
29	NW¼ NE¼, NW¼ & NW¼ SW¼	9	54	12	240	
30	NE¼ NE¼, W½ NE¼, S½ NW¼, W½ SE¼ & SE¼ SE¼, Lots 3, 4, 5, 6	11	54	12	449.05	

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LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota, on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp. N	R. W	Area	Numbered Contract
31	All	13	54	12	640	
32	E½, NW¼, NE¼ SW¼ & S½ SW¼	15	54	12	558.45	
33	All	17	54	12	612	
34	E½ NE¼, SE¼ SW¼, NE¼ SE¼ & Lots 2 & 5	19	54	12	257.20	
35	E½ NE¼, SW¼ NE¼, W½ & SE¼	21	54	12	600	
36	E½, E½ W½, NW¼ NW¼ & SW¼ SW¼	23	54	12	560	
37	All	25	54	12	640	
38	E½ & S½ SW¼	27	54	12	400	
39	E½ NE¼, NW¼ NE¼, NW¼ & NW¼ SW½	29	54	12	320	
40	N½ NW¼	31	54	12	73.65	
41	SW¼ NE¼, SE¼ NW¼, N½ SW¼, SE¼ SW¼ & SE¼	33	54	12	360	
42	NE¼, E½ NW¼, SW¼ NW¼, N½ S½ & SW¼ SE¼	35	54	12	480	
43	SE¼ SW¼ & SW¼ SE¼	5	55	12	80	
44	N½ NE¼ & NW¼	7	55	12	248.89	
45	W½ SW¼, SW¼ SE¼, Lots 5, 7 & 8	9	55	12	189.55	
45	Lot 2	9	55	12	46.90	10343
46	S½ NE¼, SE¼ NW¼, E½ SW¼, N½ SE¼ & Lot 3	11	55	12	307.50	
47	SE¼ NE¼, W½ NE¼, NW¼ NW¼, NE¼ SW¼, S½ SW¼, & SE¼	13	55	12	440	
48	SE¼ NE¼ & S½, less R-W 10 acres	15	55	12	350	
49	SE¼ SW¼, Lots 3, 6, 11, 12 & 13,	19	55	12	261.90	
50	W½, NE¼, E½ W½, NW¼ NW¼, SW¼ SW¼, N½ SE¼, SE¼ SE¼	21	55	12	440	
51	E½, NW¼, E½ SW¼ & Lot 1, less R-W 9 acres	23	55	12	598.60	
52	E½, NW¼, N½ SW¼ & SW¼ SW¼	25	55	12	600	
53	N½ NW¼, NW¼ SW¼, Lots 1, 2, 6 & 8	27	55	12	249.70	
54	E½, E½ NW¼, SW¼ NW¼ & SW¼	29	55	12	578.10	

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of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp.	R.	Area	Numbered Contract
55	N½ NE¼, E½ SW¼, W½ SE¼, SE¼ SE¼ & Lot 5	31	55	12	324.25	
56	SE¼ NE¼, W½ NE¼, W½ SE¼	33	55	12	548.15	
57	NW¼, N½ SW¼, SE¼ & Lot 1	35	55	12	430.60	
58	SW¼ & SW¼ SE¼	1	51	13	200	
59	SE¼	17	51	13	160	
60	N½ & W½ SW¼	21	51	13	400	
61	E½ NE¼	23	51	13	80	
62	NE¼ NE¼ & NW¼ NW¼	1	52	13	92.43	
63	NE¼ NW¼ & W½ SW¼	3	52	13	124.62	
64	NW¼ NW¼	5	52	13	42.83	
65	NE¼, E½ NW¼, SW¼ NW¼ N½ SW¼, N½ SE¼, & SE¼ SE¼	7	52	13	473.12	
66	E½ E½, SW¼ NE¼ & NW¼ SE¼	9	52	13	240	
67	NE¼ SW¼ & S½ S½	11	52	13	200	
68	NE¼, NE¼ SE¼ & S½ SE¼	13	52	13	280	
69	NE¼, S½ NW¼, SW¼, W½ SE¼ & SE¼ SE¼	15	52	13	520	
70	S½ NW¼, N½ SW¼ & SE¼ SW¼	17	52	13	200	
71	S½ NE¼, NW¼ & S½	21	52	13	560	
72	NW¼ NE¼, NW¼, N½ SW¼ & SE¼	23	52	13	440	
73	NW¼	25	52	13	160	
74	N½, N½ SW¼, SW¼ SW¼ & N½ SE¼	27	52	13	520	
75	S½ SW¼ & SE¼	33	52	13	240	
76	N½ NE¼	35	52	13	80	
77	E½ NE¼, NW¼ NE¼, W½ NW¼, SE¼ NW¼, NE¼ SW¼ & NW¼ SE¼	1	53	13	314.78	
78	Lot 4	3	53	13	33.10	
79	NE¼ SW¼	5	53	13	40	
80	S½ NW¼, NE¼ SW¼, SE¼ SE¼, Lots 2, 4, 5, 6, 7	7	53	13	351.44	
81	Lot 2	9	53	13	33.84	
82	S½ NE¼, E½ SW¼ & NW¼ SE¼	11	53	13	200	
83	SE¼ SE¼	13	53	13	40	
84	SW¼ NE¼, NW¼ SE¼ & SE¼ SE¼	25	53	13	120	
85	W½ NW¼, SE¼ NW¼ NE¼ SW¼ & SE¼ SE¼	1	54	13	201.05	

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of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota, on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note— Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp. 54	R. 13 W	Area	Numbered Contract
86	S½ SW¼,	3	54	13	80	
87	SE¼ NE¼,	5	54	13	40	
88	S½ NW¼, NW¼ SW¼ & W½ SE¼,	9	54	13	200	
89	NE¼ SE¼ & Lot 6,	11	54	13	72.50	
90	NW¼ NW¼, SE¼ SW¼, N½ SE¼ & SE¼ SE¼,	13	54	13	200	
91	NE¼ NE¼, W½ NE¼ & NW¼ SE¼,	15	54	13	160	
92	SE¼ NW¼, Lots 1 & 4,	19	54	13	132.21	
93	NE¼ SE¼, Lots 3 & 7,	21	54	13	89.10	
94	W½ NE¼, NE¼ NW¼ & SW¼ SE¼,	23	54	13	160	
95	NE¼, SE¼ NW¼, Lots 2, 4, 5, & 7,	25	54	13	290.55	
96	W½ NE¼, NE¼ NW¼, SW¼ NW¼ & W½ SW¼,	27	54	13	240	
97	SE¼ NE¼, SE¼ SW¼, SW¼ SE¼, Lots 1, 2, 5 & 7,	29	54	13	221.60	
98	S½ NE¼,	31	54	13	78.50	
99	E½ NE¼, NW¼ NE¼, SE¼ SW¼ & SW¼ SE¼,	35	54	13	200	
100	SW¼ NE¼, N½ S½, SE¼ SW¼ &SW¼ SE¼,	1	55	13	280	
101	E½ NE¼, SW¼ NE¼, N½ NW¼, SW¼ NW¼, S½ SW¼, W½ SE¼ & NE¼ SE¼,	5	55	13	431.25	
102	E½ NE¼, SW¼ NE¼, SE¼ SW¼, W½ SE¼ & SE¼ SE¼,	7	55	13	280	
103	S½ NE¼, N½ NW¼, E½ SW¼ & NW¼ SE¼,	9	55	13	289	
104	SE¼ NE¼, W½ NW¼, SE¼ SW¼ & SE¼,	11	55	13	320	
105	N½ & SW¼ SE¼,	13	55	13	360	
106	N½ NE¼, NE¼ SE¼ & W½,	15	55	13	440	
107	SE¼ NE¼, NW¼ & N½ SW¼,	17	55	13	280	
108	NW¼ NE¼ & N½ NW¼,	19	55	13	124.35	
109	E½ NE¼, SW¼ NE¼, E½ NW¼, NW¼, SW¼ NW¼, SW¼ & NE¼ SE¼,	21	55	13	440	
110	NW¼, N½ SW¼ & SW¼ SE¼,	23	55	13	280	
111	NE¼ SE¼, Lots 1, 2, 9 & 10,	25	55	13	206.35	

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of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp. N.	R. W.	Area	Numbered Contract
112	SE¼ NW¼, E½ SW¼ & N½ SE¼,	27	55	13	200	
113	NW¼ SE¼,	29	55	13	40	
114	Lot 3,	31	55	13	41.50	
115	E½ SE¼,	33	55	13	80	
116	N½ NE¼, SW¼ NE¼, E½ NW¼, NE¼ SW¼ & NW¼ SE¼,	35	55	13	280	
117	NE¼ & SW¼,	3	51	14	319.48	
118	NW¼ & E½ SW¼,	11	51	14	240	
119	SE¼,	13	51	14	160	
120	W½ NW¼ & SE½ NW¼,	17	51	14	120	
121	NE¼,	21	51	14	160	
122	SE¼,	29	51	14	160	
123	NE¼ NW¼,	1	52	14	42.04	
124	NW¼ NE¼ & Lot 1,	3	52	14	83.21	
125	E½ NE¼, N½ SW¼ & SW¼ SW¼,	5	52	14	201.55	
126	N½ NE¼ & E½ SE¼,	7	52	14	160	
127	NW¼ NW¼, NW¼ SW¼ & Lot 1,	9	52	14	127.12	
128	NW¼ NE¼, NE¼ NW¼ SE¼ SW¼ & S½ SE¼,	13	52	14	200	
129	W½ NE¼, SE¼ NE¼, S½ SW¼, SE¼ & Lot 4,	15	52	14	383.15	
130	NW¼ & Lot 5,	17	52	14	161.34	
131	NE¼, SE¼ NW¼, W½ NW¼ & SW¼,	19	52	14	441.68	
132	NE¼ & S½	23	52	14	480	
133	All	25	52	14	607.11	
134	N½ SE¼,	27	52	14	80	
135	E½ SW¼,	33	52	14	80	
136	S½ SW¼ & SE¼ SE¼,	35	52	14	120	
137	NE¼ & W½	3	53	14	449.86	
138	E½, NW¼, N½ SW¼ & SE¼ SW¼,	5	53	14	563.20	
139	W½ NE¼, SE¼ NE¼ & W½ NW¼,	7	53	14	205.97	
140	N½ N½, N½ S½, S½ SW¼, & & SW¼ SE¼,	9	53	14	440	
141	E½ NW¼ & SW¼ NW¼,	15	53	14	120	
142	N½ NE¼,	17	53	14	80	
143	SW¼ NE¼,	19	53	14	40	
144	NW¼ SW¼,	21	53	14	40	

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of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota, on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp.	R.	Area	Numbered Contract
145	NW¼ NE¼, E½ NW¼ & N½ SW¼,	29	53	14	200	
146	NE¼	31	53	14	160	
147	Island No. 1 & Lots 5, 6, & 7,	33	53	14	78.08	
148	S½ SW¼,	1	54	14	80	
149	SW¼ NW¼, S½ SW¼ & E½ SE¼,	3	54	14	200	
150	SW¼ NE¼, NW¼ SW¼ & NE¼ SE¼,	5	54	14	120	
151	SW¼ NE¼, SW¼ SW¼ & SW¼ SE¼,	7	54	14	118.92	
152	SE¼ NE¼,	9	54	14	40	
153	SE¼ SW¼,	13	54	14	40	
154	SE¼ SE¼,	15	54	14	40	
155	SW¼ NE¼, SE¼ SW¼, W½ SE¼ & SE¼ SE¼,	17	54	14	200	
156	W½ NE¼, NW¼, N½ SW¼, SW¼ SW¼ & N½ SE¼,	19	54	14	403.20	
157	SE¼ SE¼,	21	54	14	40	
158	SE¼ NW¼ & SE¼ SW¼,	23	54	14	80	
159	NE NE¼ & S½ N¼,	25	54	14	200	
160	SW¼ SW¼,	27	54	14	40	
161	NE¼ NE¼,	29	54	14	40	
162	NW¼ NE¼, W½ SE¼ & SE¼ SE¼,	31	54	14	160	
163	W½ SE¼ & SE¼ SE¼,	33	54	14	120	
164	W½, NW¼ SE¼ & E½ SE¼,	35	54	14	440	
165	SE¼ SW¼, NE¼ SE¼ & Lots 1 & 4,	1	55	14	158.96	
166	S½ NE¼, E½ SW¼ & NW¼ SE¼,	5	55	14	200	
167	SW¼ NE¼ & Lot 2,	7	55	14	81.28	
168	SW¼ NE¼ & SW¼ NW¼,	9	55	14	80	
169	NW¼ SW¼,	11	55	14	40	
170	NW¼ NE¼, NE¼ SW¼, W½ SE¼ & NE¼ SE¼,	13	55	14	200	
171	NE¼ NE¼, SW¼ NE¼, SE¼ NW¼, W½ SW¼, SE¼ SW¼ & NE¼ SE¼,	15	55	14	280	
172	NW¼ NE¼ & SE¼ NW¼,	17	55	14	80	
173	W½ NE¼, E½ NW¼, W½ SW¼ & SW¼ SE¼,	21	55	14	280	
174	Lot 2,	23	55	14	32.25	

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LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railway Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp. N	R. W	Area	Numbered Contract
175	SW¼ NW¼,	25	55	14	40	
176	SE¼ NW¼,	29	55	14	40	
177	N½ NE¼ & NE¼ NW¼,	35	55	14	120	
178	N½ NW¼,	1	51	15	80.17	
179	N½ NE¼,	3	51	15	80.08	
180	SW¼ SE¼,	5	51	15	40	
181	NW¼ NE¼, NW¼ & NW¼ SW¼,	9	51	15	240	
182	E½ W½ & SW¼ SW¼,	11	51	15	200	
183	E½ NW¼, SW¼ NW¼ & S½,	15	51	15	440	
184	Lots 1 & 3,	1	52	15	35.30	
184	Lots 8 & 9,	1	52	15	74.03	8772
185	SW¼ NW¼, N½ SW¼ & SE¼ SE¼,	3	52	15	160	
186	Lots 6 & 7,	11	52	15	56.51	
187	W½ NE¼ & SE¼,	13	52	15	240	
188	SE¼ NE¼, Lots 1, 2, 3, & 4,	17	52	15	179.17	
188a	Lots 2, 6, 7 & 8,	19	52	15	152.92	
189	S½ NE¼, SE¼ NW¼, SW¼ SW¼ SE¼ SE¼,	23	52	15	200	
190	NE¼, E½ NW¼ & S½,	25	52	15	560	
191	NW¼ SW¼ & S½ SE¼,	27	52	15	120	17676
192	N½ N½,	31	52	15	158.97	
193	S½ NE¼, NE¼ SW¼, N½ SE¼ & SE¼ SE¼,	33	52	15	240	17676
194	NW¼,	35	52	15	160	17676
195	NE¼ NE¼ & W½ NE¼, E½ NW¼ & N½ SW¼,	1	53	15	250.03	
196	S½ NE¼ & N½ SE¼,	3	53	15	160	
197	SE¼ NE¼,	5	53	15	40	
198	W½ NE¼, SE¼ NE¼, W½ & SE¼,	7	53	15	596.88	
199	SE¼ NE¼, NE¼ NW¼, SE¼ SW¼ & N½ SE¼,	11	53	15	200	
200	Lot 1,	13	53	15	29.51	
201	NE¼ NE¼,	51	53	15	40	
202	S½ SW¼, N½ SE¼, SW¼ SE¼,	17	53	15	200	
203	NE¼ NE¼, SW¼ NE¼, NW¼ NW¼ & SW¼,	19	53	15	273.19	
204	N½ NE¼, SW¼ NE¼, SE¼ NW¼, N½ SW¼, NW¼ SE¼ & SE¼ SE¼,	21	53	15	320	
205	SE¼ NE¼	23	53	15	40	

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LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota, on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp. N	R. W	Area	Numbered Contract
206	SE¼ SW¼,	25	53	15	40	
207	SE¼ NE¼ & SE¼ SW¼,	27	53	15	80	
208	NE¼, S½ NW¼, N½ SW¼, SW¼ SW¼ & NW¼ SE¼,	29	53	15	400	
209	NE¼ NE¼, SE¼ NW¼ & N½ SW¼,	31	53	15	156.17	
210	E½ NE¼ & SW¼ NW¼,	33	53	15	120	
211	W½ NE¼, W½ NW¼, SE¼ NW¼, E½ SW¼ & SW¼ SE¼,	35	53	15	317.31	
212	NE¼ SW¼ & N½ SE¼,	1	54	15	120	
213	W½ NE¼, SE¼ NE¼, E½ NW¼, SW¼ NW¼, & S½,	3	54	15	569.07	
214	S½ NE¼, SE¼ NW¼ & S½ SW¼,	5	54	15	200	
215	All	7	54	15	611.48	
216	E½, NW¼, N½ SW¼ & SE¼ SW¼,	9	54	15	600	
217	N½ NE¼, SW¼ NE¼, SW¼ NW¼, NW¼ SW¼ & SE¼ SE¼,	11	54	15	240	
218	N½ NE¼, SW¼ NE¼ & W½,	15	54	15	440	
219	N½, NE¼, NW¼ NW¼ & S½ SE¼,	17	54	15	200	
220	N½ NE¼, NE¼ SW¼, NW¼ SE¼, Lots 3, 5, & 8,	19	54	15	239.56	
221	N½ NE¼, SW¼ NE¼, NE¼ SW¼, S½ SW¼, NW¼ SE¼, SE¼ SE¼, Lots 1, 3, 4 & 5,	21	54	15	427.60	
222	SE¼ NE¼, S½ NW¼, N½ SW¼, SW¼ SW¼ & W½ SE¼,	23	54	15	320	
223	E½ NE¼, & E½ SW¼,	25	54	15	160	
224	E½ NE¼, SW¼ NE¼ & S½ NW¼,	27	54	15	200	
225	NE¼ SW¼, SW¼ SW¼ & NW¼ SE¼,	29	54	15	120	
226	NE¼ NW¼ & Lot 4,	31	54	15	81.97	
227	SW ¼ SE¼,	33	54	15	40	
228	NW¼ SW¼,	35	54	15	40	
229	SW¼ SE¼,	3	55	15	40	
230	S½ SW,	7	55	15	80.18	
231	SW¼ NW¼, N½ SW¼ & NW¼ SE¼,	9	55	15	160	
232	SE¼ NE¼, NE¼ SE¼, Lots 1, 9 & 10,	11	55	15	196.28	

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LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp. 51	R. 16	Area	Numbered Contract
233	Lots 1, 2, 3, 4, 5, 6 & 7,	15	55	15	268.58	
234	E½ NE¼ & NE¼ SE¼,	17	55	15	120	
235	NE¼, NE¼, NW¼ NW¼, S½ N½, N½ S½ & S½ SE¼,	19	55	15	484.14	
236	N½ NE¼, SW¼ NE¼, S½ NW¼, N½ SW¼, Lots 2, 3, 4, 6 & 8,	21	55	15	401.39	
237	NE¼, S½ NW¼, SW¼ & N½ SE¼,	23	55	15	480	
238	SW¼ NW¼ & E½ SW¼,	25	55	15	120	
239	N½ NW¼, SE¼ SE¼, Lots 1 & 2,	27	55	15	199	
240	NE¼ NE¼, N½ NW¼, SW¼ NW¼, NE¼ SE¼, Lots 1, 4, 8 & 9,	29	55	15	302.90	
241	SW¼ SE¼,	31	55	15	40	
242	N½ SE¼,	35	55	15	80	
243	SE¼ NE¼ & NW¼ SE¼,	5	52	16	80	
244	NE¼ NW¼,	9	52	16	40	
245	SW¼ NE¼, NE¼ SW¼, S½ SW¼, W½ SE¼, Lots 1, 2 & 3,	13	52	16	368.10	
246	E½ SW¼, SE¼, Lots 5, 6 & 8,	25	52	16	334.05	
247	Lots 1, 2 & SE¼ SE¼,	1	53	16	117.83	
248	Lot 4,	5	53	16	36.85	
249	All,	1	54	16	627.76	
250	E½ NE¼ SW¼, SW¼ SW¼, Lots 5 & 6,	3	54	16	423.36	
251	Lot 9,	7	54	16	13	
252	SW¼ NW¼, Lots 1, 2 & 4,	9	54	16	175.75	
253	NE¼, E½ NW¼, SW¼ NW¼, NE¼ SW¼ & N½ SE¼,	11	54	16	400	
254	NE¼ NW¼, Lots 2 & 7,	13	54	16	120.25	
255	SE¼ SW¼,	15	54	16	40	
256	SW¼ NE¼,	17	54	16	40	
257	Lot 8,	19	54	16	.50	
258	S½ N½, NE¼ SW¼, NW¼ SE¼ & SE¼ SE¼,	23	54	16	280	
259	NE¼ NE¼,	25	54	16	40	
260	NE¼ SW¼,	31	54	16	40	
261	N½ NW¼ & SE¼ NW¼,	35	54	16	120	
262	S½ NE¼, SW¼ NW¼, N½ S½ & SE¼ SE¼,	13	55	16	320	
263	S½ SW¼,	15	55	16	80	
264	S½ S½,	17	55	16	160	
265	E½ SE¼,	19	55	16	80	

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LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota, on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(**Note**—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp.	R.	Area	Numbered Contract
266	NW¼ NW¼, S½ N½ & SW¼....	21	55	16	337	
267	N½ NE¼, SE¼ NE¼, N½ NW¼, SW¼ NW¼, NW¼ SW¼ & S½ S½, ...	23	55	16	440	
268	NW¼ NE¼ & N½ NW¼,.....	25	55	16	120	
269	N½ NE¼, SW¼ NE¼ & NW¼,..	27	55	16	280	
270	NE¼ SW¼, Lots 1, 2, 3, 7, 8 & 10,	29	55	16	216.75	
271	SE¼ SE¼, & Lot 3,.....	33	55	16	76.25	
272	All	35	55	16	468	
273	Lot 2, ...	3	53	17	27.48	
274	SE¼ NE¼, SE¼ NW¼, E½ SW¼ & S½ SE¼, ...	5	53	17	240	
275	N½ N½ & SE¼ NW¼,.....	9	53	17	200	
276	NE¼, E½ NW¼, SW¼ NW¼, SW¼ SE¼, & E½ SE¼, ...	11	53	17	400	
277	S½ NE¼, SE¼ NW¼, NE¼ SW¼ & N½ SE¼, ...	13	53	17	240	
278	NW¼ NE¼, SE¼ NE¼, W½ SE¼, & SE¼ SE¼, ...	15	53	17	200	
279	W½ NW¼ & S½.....	25	53	17	400	
280	Lot 2, ...	5	54	17	34.92	
281	Lots 1 & 2, ...	7	54	17	71.49	
282	Lots 1, 2, 3, 4, 5, 6, 7, 8 & 9,.....	9	54	17	298.75	
283	Lots 3 & 4, ...	11	54	17	76.50	
284	SW¼ SW¼, ...	13	54	17	40	
285	Lots 1, 2, 3, 6, 7, 8 & 9,.....	17	54	17	261.50	
286	S½ NE¼, SE¼ SW¼, W½ SE¼, SE¼ SE¼, Lots 1, 2, 3, & 4,.....	13	55	17	359.50	
287	N½ NW¼, Lots 1 & 2,.....	23	55	17	157.20	
288	E½ SE¼, ...	33	55	17	80	
289	Lots 1, 2, 3, & NE¼ NW¼,.....	7	53	18	99.78	
290	N½ NW¼, ...	17	53	18	80	
291	SW¼ SW¼, ...	3	54	18	40	
292	NE¼ NE¼ & SE¼ SE¼.....	9	54	18	80	
293	N½ NW¼, SE¼ NE¼, S½ SW¼, NE¼ SE¼ & SW¼ SE¼,.....	13	54	18	280	
294	NE¼ NE¼, NW¼ SE¼ & SE¼ SE¼, ...	15	54	18	120	
295	SE¼ SW¼ & SW¼ SE¼.....	17	54	18	80	
296	E½ SE¼, ...	19	54	18	80	6222
297	NW¼ SW¼, ...	21	54	18	40	
298	NW¼ NW¼, S½ SW¼ & W½					

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LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(**Note**—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp.	R.	Area	Numbered Contract
	SE¼,					
299	SW¼ NE¼, NW¼ NW¼, SE¼ NW¼ & NE¼ SW¼,	23	54	18	200	
300	N½ NW¼ & NW¼ SE¼,	25	54	18	160	
301	NE¼ NW¼,	29	54	18	120	
302	S½ SW¼,	35	54	18	40	
303	NW¼ NE¼ & NW¼,	19	55	18	75.17	
304	SE¼ NE¼, NE¼ SE¼, Lots 4, 5 & 6,	33	55	18	200	
305	SE¼ NW¼, E½ SW¼, Lots 1, 2, 4, 5, 6, 7 & 8,	5	52	19	152.59	
306	NW¼,	7	52	19	289.39	
307	Lot 7,	9	52	19	160	
308	SW¼ SE¼,	13	53	19	39.55	
309	E½ SE¼,	15	53	19	40	
310	E½ NW¼, NW¼ SE¼, Lots 3 & 4,	17	53	19	80	
311	SW¼ SW¼,	19	53	19	196.40	
312	S½ SE¼, Lots 1, 3, 4, 6, 7, 8, 9, & 10,	25	53	19	40	
313	W½ W½,	27	53	19	294.65	
314	SE¼ NW¼, NE¼ SW¼, Lots 1, 2, 3, 4, & 6,	29	53	19	160	
315	NE¼ SW¼, SE¼ SE¼, Lots 1, 2, 3, 4, 6, & 7,	31	53	19	244.95	
316	NW¼ NW¼, SE¼ NW¼, NW¼ SE¼, Lots 6 & 9,	33	53	19	309.50	
317	All	5	54	19	194.60	
318	E½ E½, W½ NW¼, NW¼ SW¼, Lots 1, 2, 3, 4, 5, 6, 7, & 8,	7	54	19	626.40	
319	SE¼, NW¼ SW¼ & S½ SW¼,	17	54	19	580.45	
320	SW¼ NW¼,	21	54	19	280	
321	E½ NE¼, E½ SW¼, Lots 1, 4, 5, 6, 7 & 8,	27	54	19	40	
322	SE¼ SE¼,	29	54	19	362.60	
323	NE¼ NE¼, NW¼ & NW¼ SE¼,	31	54	19	40	
324	Lots 6 & 7,	33	54	19	239.75	
324	Lots 13,	15	55	19	53.85	17311
325	E½ SE¼ & SW¼ SE¼,	15	55	19	.05	
325	Lots 1, 2, & SE¼ NE¼,	21	55	19	120	
326	NW¼ NW¼,	21	55	19	64.50	2155
327	SW¼ NE¼, SE¼ NW¼, NE¼	25	55	19	40	

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LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota, on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp. N	R. W	Area	Numbered Contract
	SW¼ & NE¼ SE¼,	27	55	19	160	
328	Lot 6,	29	55	19	.30	15795
329	SE¼ NE¼, SE¼, Lots 3, 5, 6 & 9,	31	55	19	333.92	
330	W½ E½, W½ & SE¼ SE¼,	33	55	19	520	
331	NE¼ NE¼ & S½ NW¼,	35	55	19	120	
332	SE¼ NW¼ & Lots 3, 4, 5, 6, 7, 8 & 9,	5	51	20	208.95	
333	W½ NE¼, Lots 2, 3, & 4,	7	51	20	184.91	
333	E½ NW¼,	7	51	20	80	17743
334	S½ SE¼,	1	52	20	80	
335	Lot 4,	7	52	20	50.15	
336	SE¼ SW¼, Lots 1, 2, 3, 5, 6, 7 & 8,	13	52	20	289.55	
337	S½ N½ & N½ S½,	23	52	20	320	
338	SW¼ SE¼,	29	52	20	40	
339	S½ SE¼,	1	53	20	80	
340	E½ SW¼ & SE¼,	19	53	20	240	
341	W½ SW¼,	21	53	20	80	
342	NW¼, E½ SW¼ & W½ SE¼,	23	53	20	320	
343	S½ NE¼, N½ SW¼, SE¼ SW¼ & SE¼,	1	54	20	360	
344	SE¼ NE¼ & NE¼ SE¼,	5	54	20	80	
345	SE¼ SE¼,	9	54	20	40	
346	NE¼ NW¼, S½ NW¼ & SE¼ SE¼,	13	54	20	160	
347	SE¼ SW¼,	33	54	20	40	
348	S½ N½, SE¼ SW¼, NE¼ SE¼ & S½ SE¼,	13	55	20	320	
349	S½ NE¼ & W½ SE¼,	15	55	20	160	
350	NW¼ NW¼	23	55	20	40	
351	SW¼ SW¼,	1	51	21	40	16195
351	SE¼ SW¼,	1	51	21	40	16284
352	SW¼ SE¼,	3	51	21	40	
353	NE¼ SE¼,	7	51	21	40	
354	NE¼ NE¼ & SE¼ SE¼,	9	51	21	80	
355	E½ NE¼,	11	51	21	80	17428
355	S½ SE¼,	11	51	21	80	17735
355	W½ NE¼, E½ NW¼, SW¼ NW¼, SW¼ & N½ SE¼,	11	51	21	440	
356	W½ NE¼, NW¼, N½ SW¼, SW¼ SW¼ & NW¼ SE¼,	13	51	21	400	
357	N½, N½ SW¼, SW¼ SW¼, & SW¼ SE¼,	15	51	21	480	

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LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp.	R.	Area	Numbered Contract
358	SE¼,	17	51	21	160	
359	SW¼, N½ SE¼ & SW¼ SE¼	19	51	21	275.16	
360	NW¼ NW¼,	21	51	21	40	
361	Lot 1,	31	51	21	42.15	
362	NE¼ NE¼,	33	51	21	40	
363	W½ SE¼ & SE¼ SE¼,	7	52	21	120	
364	N½ NE¼, less R-W	17	52	21	80	
365	NE¼ NW¼,	27	52	21	40	
366	W½ SW¼,	29	52	21	80	
367	NE¼ NE¼,	31	52	21	40	
368	SW¼ SW¼,	3	53	21	40	
369	E½ SW¼, SE¼, Lots 1, 2, 3, & 4,	5	53	21	361.44	
370	S½ NE¼,	7	53	21	80	
371	SW¼ SW¼,	9	53	21	40	
372	NE¼ & NE¼ NW¼,	11	53	21	200	
373	S½ NE¼, E½ NW¼, SW¼ NW¼ & NW¼ SE¼,	15	53	21	400	
374	W½ NE¼,	17	53	21	80	
375	NE¼, SE¼ NW¼ & N½ SE¼,	21	53	21	280	
376	NE¼ NW¼, SE¼ SW¼, W½ SE¼ & SE¼ SE¼,	23	53	21	200	
377	E½, NW¼ & NE¼ SW¼,	35	53	21	520	
378	S½ SE¼,	35	53	21	80	
379	NE¼ & NW¼ SE¼,	5	54	21	197.29	
380	E½, SE¼ NW¼, Lots 4 & 5,	7	54	21	440.55	
381	SE¼ NW¼,	21	54	21	40	
382	W½ SW¼,	27	54	21	80	
383	NW¼ NE¼, NW¼ NW¼, NW¼ SW¼ & NW¼ SE¼,	31	54	21	160.63	
384	SW¼ NE¼, SE¼ SW¼ & SW¼ SE¼,	33	54	21	120	
385	SE¼ SW¼ & Lot 6,	21	55	21	40.30	
386	NE¼ SW¼, NW¼ SE¼, S½ S½, Lots 1, 5, 6 & 7,	29	55	21	366.65	
386	Lots3, 4 & NW¼ SW¼,	29	55	21	120.55	1234
387	S½ SE¼,	31	55	21	80	
387	Lots 1 & 2,	31	55	21	78.65	1234
388	S½ SW¼, Lots 3, 4, & 5,	33	55	21	182	1234

389 All the patented or selected lands and rights in respect of such lands of the Northern Pacific Railroad Company in the said County of St. Louis, State of Minnesota, whether specified in the foregoing list or not, will be included in such sale.

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LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota, on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp.	R.	Area	Numbered Contract
			N	W		

390 All lands within the County of St. Louis in the State of Minnesota, granted by the Congress of the United States to aid in the construction and equipment of the railroads of the Northern Pacific Railroad Company, for which patents have not issued and which have not been selected by and certified to said railroad company, but to which said railroad company is entitled under said grants of Congress, and all rights of said railroad company, to receive from the United States any lands within said county and state, which have not been certified or patented to said railroad company, whether under the grant expressed in the act of Congress of July 2, 1864, or under any subsequent grant by way of indemnity or otherwise to said railroad company together with all the right, title, interest and claim in or to any such lands, and all its rights to receive from the United States patents therefor; and also all mineral and other reservations and exceptions of every nature and description contained in any conveyance or contract in respect of lands within said County and State at any time made by said Railroad Company or its Receivers, or otherwise, and all rights, benefits, equity of redemption, title, interest or claim of said Railroad Company thereunder, and in and to all lands granted to it by the Congress of the United States within said County and State, and which may not be included in the sale under said decrees under the foregoing descriptions of lands, for which letters patent have issued to said Railroad Company and the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said Company, whether or not such lands are now held by or have been heretofore sold, or contracted to be sold, by said Railroad Company or such Receivers, or are claimed to have been sold under judicial proceedings or for non-payment of taxes, or for any cause soever, and whether or not the same stand in the name of the said Railroad Company; it being the intention to include every possible right, title and interest of said Railroad Company in and to any of the lands within said county and state covered by any grant to said Railroad Company by the Congress of the United States, and which may not be included in the sale under said decrees under the foregoing description of lands for which letters patent have issued to said Railroad Company, and the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said Company; all subject, however, to a certain mortgage or deed of trust, dated the 1st day of January, 1881, known as the General First Mortgage of said Northern Pacific Railroad Company, and executed by it to the Central Trust Company of New York, as Trustee.

Defendant's Exhibit No. 11.

270 Circuit Court of the United States, District of Minnesota.

The Farmers' Loan and Trust Company,
Against
Northern Pacific Railroad Company and others.

In Equity. Original Decree.

This cause came on to be heard on the Bill of complaint filed herein on May 26, 1896, by the complainant The Farmers' Loan and Trust Company and the answers of all the defendants herein to the said bill, and upon the pleadings, herein and upon the entire record in this cause: and it appearing to this Court that said Bill of Complaint and a certain Bill and Supplemental Bill of complaint pending in the Circuit Court of the United States for the Eastern District of Wisconsin, between the same parties, were brought for the purpose of sequestrating, selling and distributing among the creditors and parties entitled thereto all the lands, assets, property and effects of said defendant the Northern Pacific Railroad Company, other than the property in and by the decree of foreclosure heretofore entered in this cause on the 29th day of April, 1896, and in said Circuit Court of the United States for the Eastern District of Wisconsin, on the 27th day of April, 1896, found to be covered by the mortgage therein described and executed by said defendant Railroad Company to the Farmers' Loan and Trust Company, as trustee, or by said decrees directed to be sold thereunder: and it further appearing that certain of said remaining lands, assets, property, and effects are within the jurisdiction of this Court, and that a portion thereof are within the jurisdiction of said Circuit Court of the United States for
271 the Eastern District of Wisconsin: and it further appearing that a final decree of sequestration was taken and entered on the 25th day of May 1896, in said suit now pending in said Circuit Court of the United States for the Eastern District of Wisconsin, and a certified copy of said decree having been filed in this cause in this court: and it appearing that said Circuit Court of the United States for the Eastern District of Wisconsin is possessed of primary jurisdiction of the matters involved in this cause, and that said decree of sequestration entered in said Circuit Court of the United States for the Eastern District of Wisconsin is in the words and figures, following, to-wit:

Circuit Court of the United States, for the Seventh Judicial Circuit Eastern District of Wisconsin.

The Farmers' Loan and Trust Company, Complainant,
vs.
Northern Pacific Railroad Company, Phillip B. Winston, George R. Sheldon, William S. P. Prentice, William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Co. Edward D. Adams, Johnston Liningston and Charles W. Van Nostrand and others, Defendants.

Supplemental Decree.

This cause came on to be further heard upon the bill of complaint filed herein on August 15th, 1893, by the Farmers' Loan and Trust Company, Phillip B. Winston, George R. Sheldon, William S. P. Prentice, and William C. Sheldon Jr. with one William C. Sheldon, since deceased, and upon the answer of the Northern Pacific Railroad Company thereto filed herein on said day, and upon the supplemental Bill of the complainant herein filed this day and the Answers of the Northern Pacific
272 Railroad Company and the other defendants thereto and upon the other pleadings and proofs herein and upon all the papers on file, and was argued by Counsel, and upon consideration thereof, it was, on motion of Turner, McClure & Rolston, and Winkler, Flanders, Smith, Bottum and Vilas, Solicitors for the complainant, The Farmers' Loan and Trust Company, all the other parties appearing by counsel as follows, to-wit: Northern Pacific Railroad Company by Silas W. Pettit, Esq., and John F. Harper, Esq., its counsel: Edward D. Adams, Phillip B. Winston, George R. Sheldon, William S. P. Prentice, William C. Sheldon Jr., surviving partners of the firm of William C. Sheldon & Co., by William Nelson Cromwell, Esq., as counsel. Johnston Livingston and Charles B. Van Nostrand by Francis Lynde Stetson, Esq., as counsel, and no one opposing, it was thereupon

Ordered, Adjudged and Decreed as follows:

First: That the equity of said Bill and Supplement Bill is with the complainant The Farmers' Loan and Trust Company, and that the complainant is entitled to the relief therein prayed.

Second: It is hereby referred to Alfred L. Carey, Esq., of Milwaukee, as Special Master, to take an account of all the lands, assets property and effects of said Northern Pacific Railroad Company not found in and by the decree of foreclosure and sale entered herein to be covered by the mortgages of said Railroad Company executed to the Farmers' Loan and Trust Company, as trustee, or directed to be sold thereunder, in whosesoever hands the same may be and of the property as to which the receivership is hereby continued or created and of all other

property which has come or shall hereafter come into the hands of the receivers under this decree, and to ascertain and report to the court the names and residences of the creditors of said Railroad Company and the amounts and particulars of the respective claims of such claimants against said Railroad Company or its property, and it is ordered that the parties to this suit and the Receivers do attend from time to time before said Special Master as required by the order or summons of said Special Master, with the books, papers and documents in their possession relating to such property of said railroad company, that the said Special Master give notice by publication according to the course, rules and practice of this court in such cases, to all creditors of said Railroad Company not found in and by said decree of foreclosure to be covered by said mortgages to the Farmers' Loan and Trust Company, as trustee, or directed to be sold thereunder, to exhibit their claims in such manner and form as he, the said Special Master, may direct and approve, at or before such time and at such place as said Special Master may designate for that purpose, and all creditors and claimants failing to exhibit their claims to him in such manner and form within the time limited by him for that purpose shall be excluded from the benefit of the said reference under this order.

Third: That said Special Master shall pass the accounts of said receivers herein as to the matters covered by this decree, and fix the amount and items of property with which said receivers are or shall become chargeable, and on the proceedings before said Special Master any creditor or claimant who shall have filed a claim shall be allowed to except to the claim of any other claimant or creditor, and the said liberty of exception is given to either of the parties to this cause and to the said Receivers, and thereupon the said Special Master shall proceed to hear and determine without any special order, the matters of such exception, and embrace his conclusions thereon in his report to this court: and he is hereby authorized at the request of either party to any claim to make a separate
274 report to the Court upon such claim and to continue to make such separate reports from time to time whenever so requested and as the exigencies of the case may require.

Fourth: That the lands, assets, property and effects, real and personal, wheresoever situated, of said The Northern Pacific Railroad Company, other than the property found in and by said decree of foreclosure to be covered by said mortgages to the Farmers' Loan and Trust Company, as trustee, or di-

rected to be sold thereunder, be sequestrated, sold and distributed, and that Edwin H. McHenry and Frank G. Bigelow, the receivers herein, be and they are hereby continued and appointed as final receivers of said lands, assets, property and effects with all the usual powers and duties of Receivers in such cases and all the powers heretofore granted to them in the orders whereby they were appointed Receivers herein, and that the said defendant Railroad Company, except as to moneys by it received under order of any of its property other than the property found in and by said decree to be covered by said Mortgages to The Farmers' Loan and Trust Company, as Trustee, or directed to be sold thereunder, are hereby directed to deliver the same to said Receivers. And that the said defendant the Northern Pacific Railroad Company, do forthwith execute, acknowledge and deliver unto said Receivers as such [a] their successors and assigns, deed or deeds and assignments, sufficient in law, of all its right, title interest and claim in, to and upon all such other lands, property, assets and effects, and in and to any rights under any grant to it by the Congress of the United States relating to any such other lands, property, assets, or effects, and fully authorizing and empowering such Receivers, their successors and assigns, in the name of said defendant or otherwise, as they may be advised, to claim and receive from the United States patents or other sufficient
275 evidence of title, to the such other lands, nor theretofore patented, whether such other lands be within the original grant limits or in the indemnity limits of such grant of the United States.

Fifth: That said Receivers shall forthwith proceed to take possession of all such other property, assets and effects of said Railroad Company not already in their possession, and they are hereby authorized and directed from time to time to make sale or sales of such other lands, property assets and effects at public or private sale in accordance with the orders entered herein on the 22nd day of September 1893, and the 14th day of November 1893, and such further directions as the Court may hereafter make herein, and in the meantime, to act under and in accordance with said orders hereby confirmed and continued and to sue for, recover and collect and reduce to money all such other claims, demands, bills, accounts, and rights of action of said Railroad Company, and they may compromise or sell by public auction on due notice such as are doubtful or uncollectible and after deducting the amounts necessarily expended by them shall retain all moneys received by them subject to the further order of this court.

Sixth: That either party or the said Receivers may from time to time apply to this court for further directions at the foot

of the decree or on any report of the Special Master, and the costs and expenses of said references may be charged upon and paid out of the said funds in the hands of said Receivers unless otherwise directed by the said Special Master, who may award costs in his discretion, subject to review by the court, to or against any claimant, and all questions not herein disposed of are reserved for further hearing and decision, and jurisdiction in this cause is retained for the purpose and for the purpose of enforcing all the provisions of this decree.

Dated May 25th, 1895.

276 (Signed) WM. H. SEAMAN, Judge.

Thereupon, being fully advised in the premises, on motion of the Farmers' Loan and Trust Company, by its solicitors, Turner, McClure & Rolston and Eller & How, the other defendants having appeared by counsel, towit, The Northern Pacific Railroad Company by F. W. M. Cutcheon, its counsel P. B. Winston, George R. Sheldon and others by William Nelson Cromwell, their counsel, and not opposing,

It is ordered, adjudged and decreed by this court that the pleadings herein and the aforesaid decree entered in the Circuit Court of the United States for the Eastern District of Wisconsin on the 25th day of May, 1896, be and the same are hereby recognized as constituting sufficient reason for the passing of the present order and decree by this court.

It is ordered, adjudged and decreed that William D. Cornish of St. Paul, be and he is hereby, appointed Special Master in this suit to ascertain and report to this court the names and residences of the creditors of said Railroad Company, who reside in this district, the amounts due to them and the securities and liens held by them respectively for the payment of their claims. Within six weeks from this date, said Master shall publish a notice to said creditors of said company once in each week for four successive weeks in the St. Paul Pioneer Press and in the St. Paul Daily Dispatch to the effect that they must file and present their claims to him at St. Paul in this district, on or before the first day of October A. D. 1896, and that if they fail so to do they will be excluded from the benefits of this decree, the reference hereunder and the subsequent proceedings herein. The Special Master shall hear the proof of such claim at St. Paul in this district upon reasonable notice to the claimants respectively and to the parties to

277 this suit, of the time and place of such hearing. He shall report to this court with all convenient speed, and exceptions may be taken to his report by any of said creditors or by any of the parties to this suit, within thirty days

after the filing thereof, and the questions presented by said exceptions and the question of the confirmation of his report shall then be heard and determined by this Court. Upon the determination of these questions, a certified copy of his report and of the order of this court, allowing the claim referred to therein shall be forwarded to the Circuit Court of the United States for the Eastern District of Wisconsin.

All charges against, and liens upon any of the property of the Northern Pacific Railroad Company in this district not covered by the decree of foreclosure against it in this court, may be presented to and reported by said Master herein and may be enforced by proper proceedings in this court notwithstanding this order and decree. The creditors of the Northern Pacific Railroad Company, who reside in this district, are not required to present or prove their claims in any other way than as is hereinbefore directed in order to share in the benefits of this decree the reference hereunder and the subsequent distribution of the proceeds of the property in this suit. In case the claims of the creditors residing in this state, as finally allowed by this court, shall not, upon due presentation of their allowance as aforesaid to the Circuit Court of the United States for the Eastern District of Wisconsin, be there allowed and respectively classified with the same class of claims otherwise allowed in said court, or shall not be permitted to receive a pro rata share with such claims in the distribution of the proceeds of the property covered by the decree in that court in this case, then any such creditor or claimant may apply to this court for the collection and enforcement thereof and for this purpose this court reserved and retains
278 jurisdiction, control and the right of disposition of all the property of the Northern Pacific Railroad Company in this district, not covered by said foreclosure decree, and of all the proceeds thereof, notwithstanding any orders or provisions hereinbefore contained herein. On the first day of August 1896, and of every third month thereafter the receivers appointed hereunder shall file in this court a report showing the disposition of any of the property of the Northern Pacific Railroad Company in this district sold or disposed of by them under this order and decree and of the proceeds thereof.

Subject to the foregoing provisions of this decree and except as they modify the same, the decree of the United States Circuit Court for the Eastern District of Wisconsin, is hereby adopted and made the order and decree of this court, and this court doth now adjudge and decree that the lands, assets, property and effects of the said Northern Pacific Railroad

Company situated within the jurisdiction of this court and other than the property found in the and by said decree of foreclosure to be covered by said mortgages to the Farmers' Loan and Trust Company, as trustee, and directed to be sold thereunder by the decree of foreclosure in this court, be sequestrated, sold and distributed. Edward H. McHenry and Frank G. Bigelow the receivers appointed by said Circuit Court of the United States for the Eastern District of Wisconsin, are hereby appointed final receivers of the remaining lands, assets, property and effects of the Northern Pacific Railroad Company within this district and they are instructed to do and perform all and singular the things directed by this decree.

St. Paul, May 27, 1896.

WALTER H. SANBORN,
Circuit Judge.

Endorsed: Decree Filed May 27th, 1896. Oscar B. Hills, Clerk.

279 United States of America,
District of Minnesota.
Third Division.—Set.

I, Henry D. Lang, Clerk of the Circuit Court of the United States for the District of Minnesota, do hereby certify that I have carefully compared the foregoing paper writing with the original thereof, which is in my custody as such clerk, and that the said paper writing is a correct copy of such original and of the whole thereof, in the cause therein named.

Witness my hand as Clerk, and the seal of said Court. Done at my office in Saint Paul, Minnesota, this 30th day of October A. D., 1899.

(Signed) HENRY D. LANG, Clerk.

Seal of U. S. Circuit Court Dist. of Minnesota. By Louise B. Trott, Deputy.

Ten Cent Revenue Stamp.

Endorsed: Defendants Exhibit No. 11. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

280 Defendant's Exhibit No. 12.

Circuit Court of the United States, District of Minnesota, Third Division.

The Farmers, Loan and Trust Company, Complainant,
vs.

Northern Pacific Railroad Company, Phillip B. Winston, George R. Sheldon, William S. P. Prentice, William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon, & Co., Defendants.

The report of Alfred L. Cary, as Special Master of the Sales by him made of the lands and rights in respect of lands directed to be sold in and by the decrees of the Circuit Court of the United States for the Eastern District of Wisconsin, in a cause therein pending between the Farmers' Loan and Trust Company as complainant and the Northern Pacific Railroad Company and others as defendants to which this cause is ancillary, so far as such sales affect lands and rights in respect of lands in the State of Minnesota, having been filed herein; and it appearing to this Court that said Circuit Court of the United States for the Eastern District of Wisconsin in said cause to which this cause is ancillary, has upon a similar report of said Alfred L. Cary as Special Master, and of other reports of said Alfred Cary, as Special Master of sales by him made of lands and rights in respect of lands directed to be sold under said decrees and situate elsewhere than in said State of Minnesota has entered an order in the following form viz:

Circuit Court of the United States for the Seventh Judical Circuit and Eastern District of Wisconsin.

281 The Farmers' Loan and Trust Company, Complainant,

against. In Sequestration.

Northern Pacific Railroad Company, Phillip B. Winston, George R. Shendon, William S. P. Prentice and William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Co., Edward D. Adams, Johnston Livingston, Charles B. Van Norstraud, and others, Defendants.

Now come again all the parties by their respective solicitors, and comes also the purchaser Northern Pacific Railway Company; and its petition that the several reports of Alfred L. Cary, the Special Master heretofore filed herein, of the sales by him made of the lands and rights in respect of lands in and by the decrees herein directed to be sold, should be approved, and that the sales of said lands and rights in respect of lands of the Northern Pacific Railroad Company, briefly described in the notice of sale thereof, should be confirmed and made absolute, came on to be heard.

And it appearing by the several reports of said Special Master, so filed as aforesaid, that he has fully complied with the directions in said decrees as to the sale of said lands and rights

in respect of lands, and that such purchaser, the Northern Pacific Railway Company, was the highest and best bidder for said lands and rights in respect of lands sold as provided in said decrees, and that the same were struck off at the several sales thereof to the said purchaser.

Subject, however, as to the portions of said lands and rights, in respect of lands covered thereby, to the lien of a certain mortgage or deed of trust, dated January 1st, 1881, executed by the Northern Pacific Railroad Company to the Central Trust Company of New York, as trustee.

282 And it further appearing by such Special Master's Report, and by the said petition of the said purchaser, that the said purchaser has made the payments thus far obligatory upon it.

And it appearing by the said petition that the said purchaser, the Northern Pacific Railway Company, is a railroad corporation organized and existing under the laws of the State of Wisconsin, of which corporation every member is a citizen and a resident of the United States; that it had complied with all the requirements of law of each and every of the States of Minnesota and North Dakota, which are the only states of the United States in which any part of the said real property is situated, so as to enable and [entitled] it to transact business and to hold property, real and personal, in every such State; that the said corporation being the owner and holder of claims against the Northern Pacific Railroad Company which have been finally allowed by this court to the amount of more than $87,000,000 and has tendered assignment of the same to be cancelled or credited as provided in said decrees, on account of the respective bids made by said purchaser, the Northern Pacific Railway Company, for all said lands and rights in respect of lands.

And no sufficient cause being shown against the report of the Special Master or the granting of the petition of the said purchaser;

Now, on motion of Turner, McClure & Rolston, solicitors for the complainant, The Farmers' Loan and Trust Company, and of William Nelson Cromwell of counsel for the purchaser, all the other parties appearing by counsel, and all consenting that the said motion for confirmation of said sale and of the said reports of said Special Master made thereon, may be now heard and determined, and all questions thereunder adjudicated.

It is hereby ordered, adjudged and decreed as follows, to-wit:

The said several reports of Alfred L. Carey, the Special
283 Master, are in all things approved, and the respective sales by him made to the said Northern Pacific Railway Company of all and singular said patented lands and lands selected and certified and other lands and rights in respect of lands of the Northern Pacific Railroad Company, be and the same are respectively in all things ratified, approved and confirmed and made absolute, and

It is further ordered and decreed that upon delivery of the said assignments of said claims to the Special Master, but in blank as to the amount assigned out of the total of said claims, above mentioned as being held and tendered by the purchaser, prior to the execution of a deed of conveyance of said parcels, the said Special Master be and he hereby is authorized to sign, seal, execute and deliver deeds of conveyance and assignments to said purchaser, the Northern Pacific Railway Company, conveying to it all and singular the said patented lands, and lands selected and certified, and other lands and rights in respect of lands sold to it as aforesaid. But in lieu of such several deeds and assignments, the Special Master may execute, acknowledge and deliver a single deed covering and conveying as an entirety all the said lands and rights in respect of lands of the Northern Pacific Railroad Company and one assignment covering all such rights in respect of lands not embraced in said deed, wheresoever situated; and in order to facilitate the recording thereof, ten originals of each of such deeds or deed may be executed, acknowledged and delivered by the said Special Master, all or any one or more of which may be recorded, and each of which, when executed, acknowledged and delivered shall be deemed an original.

And it is further ordered and decreed, that the Receivers of this Court, shall make conveyances and assignments to
284 the said purchaser, its successors or assigns, of said lands and rights to and in respect of land.

On exhibition of any such deed or assignment executed and delivered by the Special Master as herein ordered, and upon the request of the grantee or assignee thereunder, the Receivers of this Court are authorized, directed and required to let the said purchaser, and its successors and assigns, into possession of the premises, therein conveyed, and to deliver to it any contract thereby assigned, and the Receivers of any party in this cause, having possession thereof, shall deliver such property and contracts over to the purchaser, its successors or assigns.

It is further ordered and decreed, that by way of further assurance and confirmation of title to such purchaser the said Northern Pacific Railroad Company, by its proper officers and

under its corporate seal, shall, sign, seal, execute, acknowledge and deliver to said purchaser, or to its successors or assigns, its deed or deeds of conveyance, assignment, transfer, release and further assurance of all the said lands and rights sold to said purchaser.

The Special Master shall hold said assignment of claims until the credit or payment on account thereof upon the bids of such purchaser shall be adjudged by the Court and he shall then fill up the blank in the same with the amount so due and file the same with the Clerk of this Court, and upon such filing of said assignment the said claims shall be and be deemed to be satisfied to the extent of the amount specified in said assignment.

Upon consent of the purchaser this decree is passed subject to the right of the Court to require as a condition thereof that upon final distribution of the fund in Court and in the hands of its Receivers there shall be paid upon all claims finally allowed and not owned by the purchaser a sum equal
285 to ten per centum of the amount of such claims before any payment upon claims owned by the purchaser.

Sept. 16th, 1899.

(Signed) JAS. G. JENKINS,
U. S. Circuit Judge.

And a certified copy of said order having been filed herein, and all the parties to this action appearing and consenting thereto,

Now, on motion of Jared How, solicitor for the complainant, above named,

It is ordered that said order of the Circuit Court of the United States for the Eastern District of Wisconsin, be and the same is hereby adopted and in all things made the order of this Court herein.

St. Paul, Sept. 20, 1899.

WALTER H. SANBORN,
Circuit Judge.

Endorsed: Decree of confirmation of sales of lands. Filed Sept. 20th, 1899. Henry D. Lang, Clerk, by Louise P. Trott, Deputy.

United States of America,
District of Minnesota,
Third Division—Set.

I, Henry D. Lang, Clerk of the Circuit Court of the United

States for the District of Minnesota, do hereby certify that I have carefully compared the foregoing paper writing with the original thereof, which is in my custody as such clerk, and that the said paper writing is a correct copy of such original and of the whole thereof, in the cause therein named.

Witness my hand as Clerk, and the seal of said Court. Done at my office in Saint Paul, Minnesota, this 22nd day of April, A. D., 1903.

[Seal] HENRY D. LANG, Clerk,
By Louise B. Trott, Deputy.

Endorsed: Defendant's Exhibit No. 12. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

286 Defendants' Exhibit No. 13.

Special Master's and Receivers' Deed.
St. Louis County, Minnesota.

An indenture, Made the 22nd day of September, in the year one thousand eight hundred and ninety-nine, between

Alfred L. Carey, as Special Master, appointed as such by the Circuit Court of the United States for the Eastern District of Wisconsin, in the cause in equity, and by the Circuit Courts of the United States in other districts in causes ancillary thereto as hereinafter mentioned, party of the first part;

Edwin H. McHenry and Frank G. Bigelow as Receivers of the Northern Pacific Railroad Company, a corporation created by an act of Congress of the United States, approved July 2, 1864, parties of the second part, and

Northern Pacific Railroad Company, a railroad corporation organized and existing under the laws of the State of Wisconsin, party of the third part:

Whereas, at the January term, A. D. 1896, of the Circuit Court of the United States for the Eastern District of Wisconsin—to-wit, on the 25th day of May, 1896—in a certain cause in equity pending therein, wherein The Farmers' Loan and Trust Company is complainant and the Northern Pacific Railroad Company, Philip B. Winston, George R. Sheldon, William S. P. Prentice and William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Company, and others are defendants, a certain sequestration decree was entered, whereby the said Edwin H. McHenry and Frank G. Bigelow were appointed Receivers of certain lands,
287 assets, property and effects, real and personal, of the said Northern Pacific Railroad Company, including

the lands, rights to lands and property hereinafter mentioned and described, and all of which the said defendant Northern Pacific Railroad Company, was, by said decree, ordered to forthwith convey unto said Receivers as such, their successors and assigns.

And whereas, certain decrees ancillary to that above mentioned and of like character, force and effect, were afterwards entered in like causes pending between the same parties in the Circuit Courts of the United States for the following districts, viz: in the District of Minnesota and in the District of North Dakota.

And whereas, at the January term, A. D. 1899, of the said Circuit Court of the United States for the Eastern District of Wisconsin—to-wit: on the 25th day of May, 1899—in said cause in equity pending therein, it was, among other things, ordered and decreed by said Court (1) that all the lands granted by Congress to aid in the construction and equipment of the railroads of the defendant, the Northern Pacific Railroad Company, and all rights of said defendant under the several land grants made to it by Congress in any such lands lying within the State of Minnesota and State of North Dakota east of the Missouri River, should be sold at public sale to the highest bidders in the manner specified in said decree; (2) that such sales should be made by Alfred L. Cary, Esq., who was thereby appointed Special Master for that purpose; (3) that all of said lands for which letters patent had issued to said defendant, Northern Pacific Railroad Company, and the right to receive lands for which letters patent had not issued but which had been selected by and certified to said company, should be sold in single sections or subdivisions thereof; (4) that
288 all lands for which patents had not issued and which had not been selected by and certified to said company, but to which said Northern Pacific Railroad Company was entitled under said grants of Congress, and all rights of said Northern Pacific Railroad Company to receive from the United States any lands which had not been certified or patented to said railroad company, whether under the grant expressed in the act of Congress of July 2, 1864, or under any subsequent grant, by way of indemnity or otherwise, to said company, together with all the right, title, interest and claim in or to any such lands, and all its rights to receive from the United States patents therefor, and also right, title, interest and equity in and to any other lands to which the said Northern Pacific Railroad Company might be entitled and which might have accrued or should thereafter accrue to it under any of said land grants, and also all right, title, equity and interest in and to any lands covered by or included in any of said land grants

and not thereinbefore specified, should be sold in one parcel as to such lands and rights in each county named in said decree and at the place in each such county designated in said decree; (5) that the Receivers appointed by said Court in said cause were, by said decree, required to file schedules showing the lands and rights to be sold under said decree with the Clerk of said Court and with the Clerks of the United States Circuit Courts for the Districts of Minnesota and North Dakota respectively, at least thirty days before the date of the first sale to be made under said decree; (6) that such sales should respectively be made upon a day or days to be fixed by said Special Master, and notice of the times and places of said sales, describing the property and rights to be sold and referring to said decree, should be published respectively once a week for at least four weeks prior to such sales, respectively in a newspaper printed, regularly issued and having a general
289 circulation in the county and state where said sales, respectively, were to be made as provided and designated in said decree.

And whereas, certain decrees ancellary to that of May 25th, 1899, above mentioned and of like character, force and effect, were entered June 5th, 1899, in like causes pending between the same parties in the Circuit Courts of the United States for the following districts, viz: in the District of Minnesota and in the District of North Dakota.

And whereas, said party of the first part, in pursuance of said decrees and a notice of sale given by him as required by said decrees, did, at one of the places and in one of the counties specified in said decrees as at and in which one of said sales was to be made, to-wit: at the Court House at Duluth in the County of St. Louis and State of Minnesota, and at the time specified in said notice of sale for the sale in said county, offer at public sale all the lands within said county granted by Congress to aid in the construction and equipment of the railroads of the defendant, Northern Pacific Railroad Company, and all rights of said defendant under the several land grants made to it by Congress in any such lands lying within said county, due notice of the time and place of such sale having been given pursuant to said decrees and according to law, and the said decrees having been complied with in all things touching and relating to said sale.

And whereas, at such sale, all of said lands within said County of St. Louis and State of Minnesota, for which letters patent had issued to said defendant, Northern Pacific Railroad Company, and the right to receive lands for which letters patent had not issued but which had been selected by and certified

290 to said Company, were offered and sold in single sections or subdivisions thereof, and were struck off to the said party of the third part for the respective sums set forth in the schedule marked A-2 (except as to the lands represented by "Item Number 390" in said schedule) annexed to the reports of such sales made by said party of the first part and hereinafter referred to such sums being the highest sums bidden respectively therefor.

And Whereas, at such sale, all of said lands within the County of St. Louis, in the State of Minnesota, for which patents had not issued and which had not been selected by and certified to said Northern Pacific Railroad Company, but to which said railroad company was entitled under said grants of congress, and all rights of said railroad company to receive from the United States any lands within said county and state which had not been certified or patented to said railroad company, whether under the grant expressed in the act of congress of July 2, 1864, or under any subsequent grant by way of indemnity or otherwise, to said railroad company; together with all the right, title, interest, and claim in or to any such lands and all its rights to receive from the United States, patents therefor, and also all mineral and other reservations and exceptions of every nature and description contained in any conveyance or contract in respect of lands within said county and state at any time made by said railroad company or its Receivers, or otherwise, and all rights, benefits, equity of redemption, title, interest, or claim of said railroad company thereunder, and in and to all lands granted to it by the Congress of the United States within said county and state and which might not be included in the sales under said decrees under the foregoing description of lands for which letters patent had issued to said railroad company, and the right to receive lands for which letters patent had not issued, but which had been selected by and certified to said com-

291 pany, whether or not such lands were then held by or had been theretofore sold or contracted to be sold by said railroad company or such Receivers, or were claimed to have been sold under judicial proceedings, or for non-payment of taxes or for any cause soever, and whether or not the same stood in the name of said railroad company, it having been the intention to include every possible, right, title and interest of said railroad company in and to any of the lands within said county and state covered by any grant to said railroad company, by the Congress of the United States, and which might not be included in the sale under the said decrees under the foregoing description of lands for which letters patent had issued to said railroad company and the right

to receive lands for which letters patent had not issued, but which had been selected by and certified to said company, all subject, however, to a certain mortgage, or deed of trust dated the first day of January, 1881, known as the General First Mortgage of said Northern Pacific Railroad Company, and executed by it to the Central Trust Company of New York as trustee, were offered and sold in one parcel and were struck off to said party of the third part for the sum specified in said Schedule A 9 of said reports of sales as the amount at which the lands and rights represented by "Item Number" 174 of said schedule were struck off, such sum being the highest sum bidden therefor.

And Whereas, the said sales with respect to such of the lands sold as had theretofore been contracted to be sold by the Northern Pacific Railroad Company, or by its Receivers, were made subject to the rights of the purchasers under such contracts.

And Whereas, said party of the first part, as such Special Master, did duly make his reports of sales to and file
292 the same with the said Circuit Court of the United States for the Eastern District of Wisconsin, on the 25th day of August, 1899, and also to and with the said Circuit Court of the United States for the District of Minnesota, on the 26th day of August, 1899, which said reports and the sales therein reported were, upon due notice to all parties, duly confirmed by the decrees of said Circuit Courts, respectively, entered on the following dates, viz., in the Eastern District of Wisconsin, on the 16th day of September, 1899, and in the District of Minnesota, on the 20th day of September, 1899.

And Whereas, in and by said decrees of confirmation, the said Special Master was authorized to sign, seal, execute and deliver to the said party of the third part deeds of conveyance and assignments, conveying to it all and singular the property, premises and rights of every kind and description so sold as aforesaid pursuant to the terms and conditions of such sale, and said Receivers were also ordered to make conveyances and assignments to the said party of the third part, its successors, or assigns, of said lands and rights to and in respect of land.

And Whereas, said party of the third part has fulfilled all the terms of purchase and made full payment of such bids as provided by such decrees.

Now, Therefore, This Indenture, Witnesseth, that said Alfred L. Cary, as such Special Master, party of the first part, in order to carry into effect the sales made by him as afore-

said to the party of the third part in pursuance of the said decrees and in conformity to the law and in consideration of the premises and of the prices and sums so bidden as aforesaid
293 by the said party of the third part and by it to him paid, amounting in the aggregate to the sum of one hundred seventeen thousand seven hundred dollars, the receipt whereof is hereby acknowledged, and the said Edwin H. McHenry and Frank G. Bigelow, as such Receivers, parties of the second part, pursuant to the authority, and direction to them given in and by said several decrees as hereinbefore recited and by reason of the premises and for the considerations hereinbefore expressed, have granted, bargained, sold, assigned, aliened, released, conveyed and confirmed, and the said parties of the first and second parts by these presents do grant, bargain, sell, alien, release, convey and confirm unto the said Northern Pacific [Railroay] Company, party of the third part hereto, and to its successors and assigns, forever, the following described property embraced and included in said decrees and thereunder and thereby authorized and directed to be sold, viz.:

All lands within the said County of St. Louis, in the said State of Minnesota, granted by the Congress of the United States to aid in the construction and equipment of the railroads of the Northern Pacific Railroad Company, for which letters patent have issued to said railroad company, and the right of said railroad company to receive the lands within said last mentioned county under said grants of Congress for which letters patent have not issued, but which have been selected by and certified to said company, being all the lands and rights in respect of lands described and set forth in said schedule marked A-2, annexed to and forming part of said Special Master's reports to the said Circuit Courts of the United States of sales in said State of Minnesota, and filed in
294 the offices of the clerks of said courts as aforesaid, except the lands and rights represented by "Item number" 390, in said schedule, together with all the right, title, interest, benefit, claim and demand of said Northern Pacific Railroad Company, and the Receivers thereof, in, to, under or by reason of the certain contracts made by said Company or Receivers for the sale of certain of said lands designated upon said schedule by a specific number as to the portions of said lands covered thereby, and all moneys due and to grow thereunder.

Also, all lands within the said County of St. Louis, in the said State of Minnesota, granted by the Congress of the United States to aid in the construction and equipment of the rail-

roads of the Northern Pacific Railroad Company, for which patents have not issued, and which have not been selected by and certified to said railroad company, but to which said railroad company is entitled under said grants of Congress, and all rights of said railroad company to receive from the United States any lands within said county and state, which have not been certified or patented to said railroad company, whether under the grant expressed in the act of Congress of July 2, 1864, or under any subsequent grant, by way of indemnity or otherwise, to said railroad company, together with all the right, title, interest and claim in or to any such lands, and all its rights to receive from the United States patents therefor, and also all mineral and other reservations and exceptions of every nature and description contained in any conveyance or contract in respect of lands within said county and state at any time made by said railroad company or its Receivers or otherwise, and all rights, benefits, equity of redemption, title, interest or claim of said railroad company there-

295 under and in and to all lands granted to it by the Congress of the United States within said county and state and which may not be included in the sale under said decrees under the foregoing description of lands for which letters patents have issued to said railroad company, and the right to receive lands for which letters patent have not issued but which have been selected by and certified to said company, whether or not such lands are now held by or have been heretofore sold or contracted to be sold by said railroad company or such Receivers, or are claimed to have been sold under judicial proceedings or for non-payment of taxes or for any cause soever, and whether or not the same stand in the name of said railroad company; it being the intention to include every possible right, title and interest of said railroad company in and to any of the lands within said county and state covered by any grant to said railroad company by the Congress of the United States and which may not be included in the sale under said decrees under the foregoing description of lands for which letters patent have issued to said railroad company, and the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said company, all subject, however, to a certain mortgage or deed of trust dated the first day of January, 1881 known as the General First Mortgage of said Northern Pacific Railroad Company and executed by it to the Central Trust Company of New York as trustee.

296 To have and to hold all and singular, the above mentioned and described property and premises hereby conveyed or intended so to be, unto the said party of the

third part, its successors and assigns, to its and their own proper use, benefit and behoof, forever.

Subject, However with respect to such of the land hereinbefore described as have heretofore been contracted to be sold by the Northern Pacific Railroad Company or by its Receivers, to the rights of the purchasers under said contracts.

In Witness Whereof, the said Alfred L. Cary, as such Special Master, party of the first part, and the said Edwin H. McHenry and Frank G. Bigelow, as such Receivers, parties of the second part, have hereunto set their hands and seals the day and year first above written.

[Seal]

ALFRED L. CARY,
As Special Master.

Signed sealed and delivered
In the presence of
Edward G. Paul
John W. B. Van Houten
As to the signatures of Alfred
L. Cary and Frank G. Bigelow.

[Seal]

FRANK G. BIGELOW,
As one of the Receivers of the
Northern Pacific Railroad Company.

[Seal]

EDWIN H. McHENRY,
As one of the Receivers of the
Northern Pacific Railroad Company.

W. F. Von Deyn
Earl L. Marvin,

As to the signature of Edwin H. McHenry.

(Internal Revenue Stamps in the sum of $118.00 are hereunto affixed and cancelled).

297 State of Wisconsin,
County of Milwaukee—ss.

On this 23rd day of September, A. D. 1899, before me personally appeared Alfred L. Cary, to me known to be one of the persons described in and who executed the foregoing instrument as Special Master, and also known to me to be Special Master as therein described, and acknowledged to me that he executed said instrument as his free act and deed as such Special Master, for the uses and purposes therein mentioned and contained.

In Witness Whereof, I have hereunto set my hand and seal of office as Notary Public in and for the State of Wisconsin, at the City of Milwaukee and State of Wisconsin, this 23rd day of September, 1899.

EDWIN G. PAUL,
Notary Public, Residing in Milwaukee County, Wisconsin.

State of Wisconsin,
County of Milwaukee—ss.

On this 23rd day of September, A. D. 1899, before me personally appeared Frank G. Bigelow, to me known to be one of the persons described in and who executed the foregoing instrument as one of the Receivers of the Northern Pacific Railroad Company, and also known to me to be one of said Receivers as therein described, and acknowledged to me that he executed said instrument as his free act and deed as such Receiver, for the uses and purposes therein mentioned and contained.

In Witness Whereof, I have hereunto set my hand and seal of office as Notary Public in and for the State of Wisconsin, at the City of Milwaukee, in said County of Milwaukee, and State of Wisconsin, this 23rd day of September, 1899.

EDWIN G. PAUL,
Notary Public, Residing in Milwaukee
298 County, Wisconsin.

State of Minnesota,
County of Ramsey—ss.

On this 25th day of September, A. D. 1899, before me personally appeared Edwin H. McHenry, to me known to be one of the persons described in and who executed the foregoing instrument as one of the Receivers of the Northern Pacific Railroad Company, and also known to me to be one of said Receivers as therein described, and acknowledged to me that he executed said instrument as his free act and deed as such Receiver, for the uses and purposes therein mentioned and contained.

In Witness Whereof, I have hereunto set my hand and seal of office as Notary Public in and for the State of Minnesota, at the City of St. Paul, in said County of Ramsey and State of Minnesota, this 25th day of September, 1899.

W. F. VON DEYN,
[Seal] Notary Public, Residing in Ramsey County, Minnesota.

Endorsed: Defendant's Exhibit "13". Filed Dec. 1st, 1906 Henry D. Lang, Clerk, By E. Catherine Neff, Deputy Clerk.

299 Defendant's Exhibit No. 14.

This Indenture Made this 21st day of December, A. D. 1899, by and between the Northern Pacific Railroad Company, a corporation created by and existing under and by virtue of an act of the congress of the United States of America entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific coast, by the northern route," approved July 2, 1864, party of the first part, and the Northern Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, party of the second part, Witnesseth:

Whereas, at the January term, A. D. 1899, of the Circuit Court of the United States for the Eastern District of Wisconsin, to-wit, on the 25th day of May, 1896, in a certain cause in equity pending therein, wherein The Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company, Phillip B. Winston, George R. [Shelon] Sheldon, William S. P. Prentice and William C. Sheldon, Junior, surviving partners of the firm of William C. Sheldon & Company, and others, are defendants, a certain sequestration decree was entered whereby Edwin H. McHenry and Frank C. Bigelow were appointed receivers of certain lands, assets, property and effects, real and personal, of the said Northern Pacific Railroad Company, including the lands, rights to lands and property, hereinafter mentioned and described; and

Whereas, certain decrees ancillary to that above mentioned, and of like character, force and effect were afterward entered in like causes pending between the same parties in the circuit courts of the United States for the following districts, viz.: in the district of Minnesota and in the district of
300 of North Dakota; and

Whereas, at the January term A. D. 1899 of the said circuit court of the United States for the eastern district of Wisconsin, to-wit, on the 25th day of May, 1899, in said cause in equity pending therein, it was, among other things, ordered and decreed by said court that all the lands granted by congress to aid in the construction and equipment of the railroads of the defendant, the said Northern Pacific Railroad Company, and all rights of the said defendant under the several land grants made to it by congress in any such lands lying within the State of Minnesota, and the State of North Dakota, east of

the Missouri River, should be sold at public sale to the highest bidder in the manner specified in said decree, and that such sale should be made by Alfred L. Cary, Esquire, who was thereby appointed special master for that purpose; and

Whereas, certain decrees ancillary to that of May 25, 1899, above mentioned, and of like character, force and effect were entered on June 5, 1899, in like causes pending between the same parties, in the Circuit Courts of the united States for the following districts, viz.: The District of Minnesota and the District of North Dakota; and

Whereas, the said Alfred L. Cary, Esquire, so appointed Special Master as aforesaid, in pursuance of said decrees and notices of sale given by him as required by said decrees, did, at the places specified, in said decrees and at the times specified in said notices of sale, offer at public sale all the lands in the State of Minnesota and in the State of North Dakota, east of the Missouri River, granted by congress to aid in the construction and equipment of the railroads of the said Northern Pacific Railroad Company, and all rights of the said Northern Pacific Railroad Company under the several land grants made to it by congress in any such lands lying within the said State of North Dakota east of the Missouri River;
301 and

Whereas, at such sales all of the said lands and rights to such lands so granted to the said Northern Pacific Railroad Company were offered and sold, as required by said decree, and were struck off to the said Northern Pacific Railway Company, the party of the second part hereto, as the highest and best bidder therefor; and

Whereas, the said Alfred L. Cary, Esquire, as such speciat master, did thereafter duly make his report of the said sales to, and file the same with, the said Circuit Court of the United States for the Eastern District of Wisconsin, on the 25th day of August, 1899, and also to and with the Circuit Court of the United States for the District of Minnesota on the 26th day of August, 1899, and also to and with the said Circuit Court of the United States for the District of North Dakota on the 28th day of August, 1899, which said reports and the sales therein reported were duly confirmed by the decrees of the said circuit courts respectively, entered on the following dates, viz.: in the Eastern District of Wisconsin on the 16th day of September, 1899, in the District of Minnesota on the 20th day of September, 1899, and in the District of North Dakota on the 21st day of September, 1899; and

Whereas, in and by said decrees of confirmation the said special master was authorized to sign, seal, execute, and deliver to the said Northern Pacific Railway Company deeds of conveyance, conveying to it all and singular the property, premises and rights of every kind and description so sold as aforesaid, pursuant to the terms and conditions of such sale; and said Edwin H. McHenry and Frank G. Bigelow, as such receivers, were also ordered to make conveyances to the said Northern Pacific Railway Company of the said lands and rights to and in respect of land; and

302 Whereas, said special master and said receivers have, in pursuance of said decrees, signed, sealed, executed and delivered to the said Northern Pacific Railway Company, the said conveyances thereby authorized; and

Whereas, in and by said decrees of confirmation it was further ordered and decreed that by way of further assurance and confirmation of title to the said Northern Pacific Railway Company, as such purchaser, the said Northern Pacific Railroad Company, by its proper officers and under its corporate seal, should sign, seal, execute, acknowledge and deliver to the said Northern Pacific Railway Company, as such purchaser, its deed or deeds of conveyance, assignment, transfer, release and further assurance of all said lands and rights to land, so sold as aforesaid to said Northern Pacific Railway Company, as such purchaser;

Now, Therefore, the said party of the first part in compliance with said decrees and for and in consideration of the sum of one dollar ($1.00), paid unto the said party of the first part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has conveyed, aliened, transferred, released and assigned, and by these presents does convey, alien, transfer, release and assign unto the said party of the second part, its successors and assigns in title, all its right, title, interest and claim in, to and upon all lands situated within the State of Minnesota and the State of North Dakota, east of the Missouri River, granted by the congress of the United States to aid in the construction and equipment of the railroads of the said Northern Pacific Railroad Company for which patents have issued, and the right to receive lands under said grants of congress for which patents have not issued, but which have been selected and certified to the said Northern Pacific Railroad Company, and also all lands granted by the congress of the United States, situated in the State of

303 Minnesota and the State of North Dakota east of the Missouri River, granted by the congress of the United States to aid in the construction and equipment of

the railroads of the said Northern Pacific Railroad Company for which patents have not issued, and which have not been selected by or certified to said railroad company, but to which said railroad company became entitled under said acts of congress and all rights to receive from the United States lands in said State of Minnesota and said State of North Dakota east of the Missouri River, which have not been certified or patented to the said Northern Pacific Railroad Company whether under the grant expressed in the act of congress of July 2, 1864, or under any subsequent grant, by way of indemnity, or otherwise, and all right, title, interest, and claim in or to any such lands, and all rights to receive patents therefor from the United States.

To have and to hold the said granted and conveyed lands, premises, rights and privileges, with the appurtenances, unto the said party of the second part, its successors and assigns forever.

And the said party of the first part, for itself and its successors, does by these presents covenant and agree to and with the said party of the second part, its successors and assigns, that it will hereafter upon the demand or request of the party of the second part, its successors or assigns, make, execute and deliver to the party of the second part, its successors and assigns, such further conveyance, transfer, assignment or deed of any or all of the premises, rights, privileges and appurtenances hereby intended to be conveyed, as to the party of the second part or its counsel learned in the law, shall seem meet and proper, and that it will execute and deliver any further instruments, agreements, transfers or deeds that may be requisite or necessary to more fully and in detail comply with said decrees so entered in said circuit courts of the United
304 States, viz: In the eastern district of Wisconsin on the 16th day of September, 1899, in the State of Minnesota on the 20th day of Sepember, 1899, and in the State of North Dakota on the 21st day of September, 1899.

In witness whereof, the said party of the first part has caused these presents to be sealed with its corporate seal and signed by its president the day and year first above written.

NORTHERN PACIFIC RAILROAD COMPANY,
By W. J. Curtis, Vice-President.

Signed, sealed and delivered in presence of
John J. Tierney,
Edward J. Walsh.

[Seal] Attest: Geo. H. Earl, Secretary.

Recorded at 10 A. M., October 20th, 1902, in St. Louis County, in 188 Deeds, page 568.

Endorsed: Defendant's Exhibit No. 14. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

Defendant's Exhibit No. 15.

305

Minnesota Division
Northern Pacific Railway Company.

This Deed, made the 19th day of January, in the year of our Lord One Thousand Nine Hundred, by the Northern Pacific Railway Company, a corporation duly incorporated under the laws of the State of Wisconsin, party of the first part, and Frederick Weyerhaeuser and John A. Humbird, of the City of Saint Paul, in the County of Ramsey and State of Minnesota, parties of the second part, Witnesseth:

That in the consideration of the sum of One Hundred and Seventy-three Thousand, Forty-four and Seventy one-hundredths (173,044.70) Dollars, unto it paid, the receipt of which is hereby acknowledged, does grant, bargain and convey unto the said parties of the second part, their heirs and assigns, the following described tracts of land, situate in the County of Saint Louis, in the State of Minnesota, that is to say:

* * * * * * * * * * * * * *

the southwest quarter of the southeast quarter of section seven (7);

* * * * * * * * * * * * * *

all in Township Fifty-four (54) North, Range Fourteen (14) West of the Fourth Principal Meridian;

* * * * * * * * * * * * * *

All the above described tracts of land containing, according to the United States Government survey Thirty-one Thousand, Eight Hundred and Ninety-one and Sixty-five one-hundredths (31,981.65) acres, more or less.

306 Excepting and reserving therefrom a strip of land for railroad right of way one hundred (100) feet in width, that is fifty (50) feet on each side of the center line of the main track of the Duluth and Iron Range Railroad, as the same is now located and constructed across the following described lands, said right of way having been conveyed to said Duluth and Iron Range Railroad Company by deed dated December 30th, 1884, to-wit:

The north half of the northwest quarter, the southeast quarter of the northwest quarter, the south half of the northeast quarter, and the northeast quarter of the northeast quarter of section one (1), in Township fifty-four (54) North, Range twelve (12) West of the Fourth Principal Meridian:

The southwest quarter of the northwest quarter, the east half of the southwest quarter and lot one (1) of section twenty-three (23), in Township fifty-five (55) North, Range twelve (12) West of the Fourth Principal Meridian:

Together with the [hereitaments] and appurtenances thereunto belonging or in anywise appertaining.

To Have and to Hold, the said lands and appurtenances unto the said parties of the second part, their heirs and assigns, forever, free and clear of all liens, charges and encumbrances, except taxes and assessments, if any, levied or assessed since the first [date] of January A. D. 1900.

The said party of the first part, for itself and its successors, covenants and agrees to and with the said parties of the second part, their heirs and assigns, that it is lawfully seized of all and singular the above granted and described premises, and has good right and lawful authority to grant, bargain, sell, and convey the same in the manner aforesaid; and that the
307 said parties of the second part, their heirs and assigns, shall and may at all times hereafter, peaceably and quietly, have, hold, possess and enjoy the above described granted premises, and that the same are free from encumbrances, except taxes and assessments, if any, levied or assessed since the first day of January A. D. 1900.

In witness whereof, the said party of the first part has caused these presents to be sealed with its corporate seal and signed by its President, the day and year first above written.

NORTHERN PACIFIC RAILWAY COMPANY.

Sealed and delivered in presence of: By C. S. Mellen, President.

P. W. Corbett
Harry A. Fabian.

Attest: W. H. Gerinnell, Assistant Secretary.

Northern Pacific Railway Company, 1896.

Revenue Stamp $173.50 Cancelled.

State of Minnesota,
County of Ramsey—ss.

On this 26th day of January, 1900, before me personally ap-

peared C. S. Mellen to me personally known, who, being by me duly sworn, did say that he is the President of the Northern Pacific Railway Company, the corporation which executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of the corporation by authority of its Board of Directors, and said C. S. Mellen acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office, in the City of St. Paul
308 the day and year last aforesaid.

[Notarial Seal] P. W. CORBETT,
Notary Public, Ramsey Co., Minn.
Ramsey County, Minn.

State of Minnesota,
County of St. Louis,

I, M. C. Palmer, Register of Deeds, of St. Louis County, State of Minnesota, do hereby certify that the descriptions hereto annexed in this instrument appear of record in Book 190 of Deeds, Pages 174 and 188 inclusive, of the records of this county, among other descriptions recorded therein.

Dated this 28th day of September, 1906.

[Seal]

M. C. PALMER,
Register of Deeds.
By Thos. Clark, Deputy.

Endorsed: Defendant's Exhibit No. 15. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy.

Defendant's Exhibit No. 17.

309 An Act Validating certain conveyances of the Northern Pacific Railroad Company and the Northern Pacific Railway Company.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company, of land forming a part of the right of way of the Northern Pacific Railroad, granted by the Government by an Act of Congress, are hereby legalized, validated, and confirmed: Provided, That no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet on each side of the center line of the main track of the railroad as now established and maintained.

Sec. 2. That this Act shall have no validating force until the Northern Pacific Railway Company shall file with the Secretary of the Interior an instrument in writing, accepting its terms and provisions.

Approved, April 28, 1904.
(Ch. 1782—58th Cong. Sess. II. 33 Stats. P. 538)

Endorsed: Defendant's Exhibit No. 17. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, By E. Catherine Neff, Deputy.

Defendant's Exhibit No. 18.

310 (Public—No. 172)

An Act for the relief of certain Entrymen and Settlers within the limits of the Northern Pacific Railway Land Grant.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the provisions of the Act of July first, eighteen hundred and nine-eight (Thirtieth Statutes, pages five hundred and nine-seven and six hundred and twenty), which provided for the adjustment by the Land Department of conflicting claims to lands within the limits of the grant to the Northern Pacific Railroad Company, and also the provisions of the Act of March second, nineteen hundred and one, entitled "An Act for the relief of settlers under the public land laws to land within the indemnity limits of the grant to the Northern Pacific Railroad Company," be, and they hereby are, extended to include any bona fide settlement or entry made subsequent to January first, eighteen hundred and nine-eight, and prior to May thirty-first, nineteen hundred and five, in accordance with the erroneous decision of the Land Department respecting the withdrawal on general route of the Northern Pacific Railroad between Wallula, Washinton, and Portland, Oregon, where the same has not since been abandoned: Provided, That all lieu selections made under this Act shall be confined to lands within the State where the private holdings are situated.

Sec. 2. That this Act shall become effective upon an acceptance thereof by the Northern Pacific Railway Com-
311 pany being filed with the Secretary of the Interior.

Approved May 17, 1906.

Endorsed: Defendant's Exhibit's No. 18. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy.

That on the 12th day of March, A. D. 1907, the Final
312 Decree in said cause was filed with said Clerk, and was by him duly recorded; which said Decree is, in words and figures, as follows, to-wit:

Herbert H. Hoyt,
No. 497. vs. In Equity.
John A. Humbird, and Frederick Weyerhaeuser.

This cause came on to be heard on the 5th day of March, A. D. 1907, at Duluth, in said district, on the bill of the complainant, the answers of the defendants, the replies thereto of the complainant, and the evidence taken thereon. Herbert H. Hoyt, Esquire, appeared on behalf of the complainant, and C. W. Bunn, Esquire, appeared on behalf of the defendants. The court having duly considered the pleadings and evidence and the arguments of counsel; now, upon consideration thereof,

It Is Ordered, Adjudged and Decreed, that the bill of the complainant be, and the same is hereby, dismissed, with costs to be taxed.

Dated at Duluth, Minnesota, March 11th, A. D. 1907.

PAGE MORRIS Judge.

313 That on the same day, to-wit: on the 12th day of March, A. D. 1907, there was entered in the Term Minutes of said Court an Order of Court staying all further proceedings in said cause, except the taxation of costs and entry of judgment therefor, for the period of forty-two days, to enable the complainant to prepare and present a bill of exceptions and make a motion for a new trial of said cause.

That on the 27th day of March, A. D. 1907, there was filed with said Clerk a Petition on Appeal and allowance thereof by the Court, Assignment of Errors and Bond on Appeal in said Cause, in words and figures following, to-wit:

Circuit Court of the United States, for the District of Minnesota, Fifth Division.

Herbert H. Hoyt, Complainant and Appellant,
vs.
John A. Humbird and Frederick Weyerhauser, Defendants and Appellees.

The above named complainant, Herbert H. Hoyt, conceiving himself aggrieved by the decree entered herein on the 12th day of March, 1907, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Eighth Circuit, and prays that this his appeal, may be allowed; and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent

to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated March 27, 1907.

H. H. HOYT,
Solicitor for Appellant.

314 The foregoing appeal is allowed March 27th, 1907.

PAGE MORRIS, Judge.

Circuit Court of the United States, for the District of Minnesota, Fifth Division.

Herbert H. Hoyt, Complainant and Appellant,
vs. In Equity.
John A. Humbird and Frederick Weyerhauser, Defendants and Appellees.

And now in the above entitled cause, and at the time of filing his petition for appeal herein, comes the said appellant, by H. H. Hoyt, his solicitor, and says that in the record and proceedings in the above entitled matter, it manifestly appears that the Court erred in the following particulars, to-wit:

First: In adjudging that the Northern Pacific Railroad Company, under its charter, approved July 2, 1864, was entitled to indemnity for the loss of the land, which was the bases of the selection of the land in controversy in the case.

Second: In not adjudging that the base land, having by act of Congress entitled "An act making a grant of lands to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior", approved May 5, 1864, been previously granted to the State of Minnesota, said land having been approved by the United States to the State of Minnesota, and by said State patented to the Lake Superior & Mississippi Railroad Company, the beneficiary of said grant, said grant to the State being prior in date to that to the Northern Pacific Railroad Company under the third section of the later
315 grant; such loss, if it occurred should be deducted from the amount granted to the Northern Pacific Railroad Company.

Third: In adjudging that indemnity could be allowed the Northern Pacific Railroad Company for the loss of the land described in the pleadings in this case; and not holding that if such loss occurred it must be charged to the grant to the Northern Pacific Railway Company.

Fourth: In adjudging that the land described in the bill of complaint herein was not vacant public land, subject to entry at the time Richard B. Jones tendered his application to purchase the same.

Fifth: In adjudging that the land described in the bill of complaint herein, which was situated on the North side of the line of the Northern Pacific Railroad Company, could be legally selected as indemnity for the base land which was situated on the South side of the railroad line.

Sixth: In not adjudging that the land described in the bill of complaint herein, was vacant public land subject to entry at the time Jones made his application to purchase the same, said land having been restored to the public domain by order of the Secretary of the Interior, July 27, 1897. (25 L. D. 48).

Seventh: In adjudging that the claim of Richard B. Jones to the land described in the bill of complaint herein, did not come within the provisions of the act of July 1, 1898; that it was not the intention of Congress in the enactment of said law to protect claims to lands of such character.

316 Eighth: In adjudging that the claim of Richard B. Jones to the land described in the bill of complaint herein did not come within the provisions of the act of July 1, 1898, for the reason that he did not complete his entry of said land by payment until subsequent to January 1, 1898.

Ninth: In adjudging that Richard B. Jones had no claim to the land described in the bill of complaint herein that could be recognized, because the land was segregated from the public domain by the selection of the same by the Northern Pacific Railroad Company.

Tenth: In adjudging that the Northern Pacific Railway Company acquired title to this land, although it appears that long prior to the approval of the selection of this land by the Secretary of the Interior, the United States had sold the same to Richard B. Jones, who had paid the price and received the evidence of his title, and the government has retained the money.

Eleventh: In adjudging that the Northern Pacific Railway Company was the successor in interest of the Northern Pacific Railroad Company.

Twelfth: In adjudging that the patent issued to the Northern Pacific Railway Company for this land was valid.

Thirteenth: In not adjudging that under the evidence in this case the patent issued to the Northern Pacific Railway Company for the land in controversy was issued without authority of law and was void.

Fourteenth: In adjudging that the act incorporating the

Superior & St. Croix Railroad Company, and the amendments thereto, its name being changed to the Northern Pacific Railway Company, authorized said corporation to pur-
317 chase this land and receive the title to the same from the United States.

Fifteenth: In adjudging that title to the land described in the bill of complaint herein was acquired by the Northern Pacific Railway Company by virtue of the sale made by the special master as set forth in the answer of the defendants, and as shown by the evidence in this case.

Sixteenth: The Court erred in dismissing the bill of complaint of complainant and the decree is erroneous in so ordering and adjudging.

Wherefore the complainant and appellant, Herbert H. Hoyt, prays that said decree of the said Circuit Court of the United States for the District of Minnesota, Fifth Division, be reversed with directions to render and enter a decree in favor of complainant and appellant and against the defendants and appellee in accordance with the prayer of this appeal and the prayer of the bill of complaint in this case.

H. H. HOYT.

Solicitor for Complainant and Appellant Herbert H. Hoyt.

318 Circuit Court of the United States, for the District of Minnesota, Fifth Division.

Herbert H. Hoyt, Complainant and Appellant,

vs.

John A. Humbird and Frederick Weyerhaeuser, Defendants and Appellees.

Know all men by these presents, That we Mortimer H. Stanford and R. H. Fagen, are held and firmly bound unto the defendants above named in the sum of Five Hundred Dollars to be paid to the said defendants for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 27th day of March, A. D. 1907.

Whereas, the above named complainant has prosecuted an appeal to the United States Circuit Court of Appeals for the Eighth Circuit to reverse the decree rendered in the above entitled suit by the Circuit Court of the United States for the District of Minnesota, Fifth Division.

Now, Therefore, The condition of this obligation is such that,

that if the above named appellant shall prosecute said appeal to effect and answer all damages and costs if he fails to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

[Seal] R. H. FAGEN,
[Seal] MORTIMER H. STANFORD.

Signed, Sealed and Delivered in presence of

Laura O. Baxter,
O. T. Wick.

United States of America.

319 District of Minnesota,
County of St. Louis—ss.

Be it known, That on this 27th day of March, A. D. 1907, before me personally appeared Mortimer H. Stanford and R. H. Fagen, to me known to be the persons described in and who executed the foregoing bond, and acknowledged the same to be their free act and deed.

[Notarial Seal] LAURA O. BAXTER,
Notary Public, St. Louis County, Minn.
My Commission Expires Feb. 12th, 1914.

United States of America.

District of Minnesota,
County of St. Louis—ss.

Mortimer H. Stanford and R. H. Fagen, the sureties named in and who executed the foregoing bond, being first duly sworn, doth each for himself, depose and say that he is a resident and freeholder of the State of Minnesota, and worth the amount of One Thousand Dollars over and above his debts and liabilities and exclusive of his property exempt from execution.

MORTIMER H. STANFORD,
R. H. FAGEN.

Subscribed and sworn to before me this 27th day of March, A. D. 1907.

[Notarial Seal] LAURA O. BAXTER,
Notary Public, St. Louis County, Minn.
My Commission Expires Feb. 12th, 1914.

The foregoing bond is approved as to form and sufficiency this 27th day of March, A. D. 1907.

PAGE MORRIS, Judge.

320 Endorsed: Petition on Appeal and Allowance thereof, Assignment of Errors and Bond on Appeal. Filed March 27, 1907. Henry D. Lang, Clerk, By Thos. H. Pressnell, Deputy Clerk.

That on the 1st day of April, A. D. 1907, there was filed with said Clerk the Citation in said cause, with proof of service thereof; which said Citation is hereunto attached.

United States of America.

321 Circuit Court. Eighth Circuit.

Citation.

United States of America. To Frederick Weyerhaeuser and John A. Humbird. Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an Appeal filed in the Clerk's Office of the United States Circuit Court, District of Minnesota, 5th Division, wherein Herbert H. Hoyt is Appellant and you are Appellee to show cause, if any there be, why the Decree rendered against the said Appellant as in said Appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Page Morris, a Judge of the District Court of the United States for the District of Minnesota, sitting as Judge of the Circuit Court in and for said District this 27th day of March, A. D. 1907.

Seal
United States
Circuit Court
District of Minnesota.
Fifth Division.

PAGE MORRIS, Judge.

Due Service of the foregoing Citation by Copy at St. Paul, Minnesota, is hereby admitted this 30th day of March, 1907.

C. W. BUNN,
Attorney for Appellees.

Entered No. 497. United States Circuit Court, District of Minnesota, 5th Division. Herbert H. Hoyt vs. Frederick Weyerhaeuser and John A. Humbird, Defendant. Citation. Filed this 1st day of April, 1907. Henry D. Lang, Clerk, By Thos. H. Pressnell, Deputy.

United States Circuit Court, District of Minnesota.
322 Fifth Division.

I, Henry D. Lang, Clerk of said Court, do hereby certify and return to the Honorable the United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing consisting of 306 pages numbered from 1 to 306 inclusive, is a true and complete transcript of the records, process, pleadings,

evidence, final decree, and all other proceedings in the cause entitled Herbert H. Hoyt vs. Frederick Weyerhaeuser and John A. Humbird, defendants, and the whole thereof—(with the exception of certain exhibits and documents expressly stipulated by all the parties to said cause and order of the Court, to be omitted from said record, which stipulation and Order appears at page 1 of this record)—as appears from the original records and files of said Court; and I further certify and return that I have annexed to said transcript and included within said paging the original Citation, with admission by attorneys for defendants, of service thereof.

In witness whereof I have hereunto set my official signature as Clerk aforesaid, and the seal of said Circuit Court, Fifth Division, at Duluth, said District and Division this 12th day of June, A. D. 1907.

Seal
United States
Circuit Court,
District of Minnesota.
Fifth Division.

HENRY D. LANG, Clerk.
By Thomas Pressnell, Deputy.

Filed June 19, 1907. John D. Jordan, Clerk.

(*Appearance of Counsel for Appellant.*)

On the nineteenth day of June, A. D. 1907, the appearance of Mr. H. H. Hoyt, as counsel for appellant, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2637.

HERBERT H. HOYT, Appellant,
vs.
FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD.

The Clerk will enter my appearance as Counsel for the Appellant.

H. H. HOYT,
Duluth, Minn.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2637. Herbert H. Hoyt, Appellant, *vs.* Frederick Weyerhaeuser, *et al.* Appearance. Filed June 19, 1907, John D. Jordan, Clerk. H. H. Hoyt, Counsel for Appellant, Duluth, Minn.

(*Appearance of Counsel for Appellees.*)

And on the twenty-eighth day of August, A. D. 1907, the appearance of Mr. Charles W. Bunn, as counsel for appellees, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2637.

HERBERT H. HOYT, Appellant,
vs.
FREDERICK WEYERHAEUSER ET AL.

The Clerk will enter my appearance as Counsel for the Appellees.

CHARLES W. BUNN,
St. Paul, Minnesota.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2637. Herbert H. Hoyt, Appellant, *vs.* Frederick Weyerhaeuser, *et al.* Appearance. Filed Aug. 28, 1907, John D. Jordan, Clerk. Charles W. Bunn, Counsel for Appellees.

(*Order of Submission.*)

And on the seventeenth day of January, A. D. 1908, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1907.

FRIDAY, *January* 17, 1908.

No. 2637.

HERBERT H. HOYT, Appellant,
vs.
FREDERICK WEYERHAEUSER ET AL.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This cause having been called for hearing in its regular order, the same was argued by Mr. Herbert H. Hoyt for the appellant and by Mr. Charles W. Bunn for the appellees.

Thereupon this cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the seventeenth day of April, A. D. 1908, an opinion of said United States Circuit Court of Appeals was filed in said cause, which said opinion as modified by an order of said Court entered on May 22, 1908, in said cause, is in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2637, December Term, A. D. 1907.

HERBERT H. HOYT, Appellant,
vs.
FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Appellees.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Mr. Herbert H. Hoyt, *pro se*, for appellant.
Mr. Charles W. Bunn for appellees.

Before Sanborn and Adams, Circuit Judges, and Philips, District Judge.

Syllabus.

1. RAILROAD LAND GRANTS—GRANTED AND INDEMNITY LANDS—WHEN TITLE VESTS RESPECTIVELY.—The right to particular tracts of land within the place limits of a railroad grant like that to the Northern Pacific Railroad Company vests in the grantee upon the filing of the map of definite location of the railroad approved by the proper officer of the government. The right to particular tracts of indemnity land under such a grant vests in the company upon the approval by the Secretary of the Interior of the company's selection of them, and neither this right nor the title thereunder relates back so as to divest the rights of prior entrymen or purchasers of the land under the general land laws of the United States.
2. SAME—WITHDRAWALS AND SUSPENSIONS OF INDEMNITY LANDS UNDER NORTHERN PACIFIC GRANTS VOID BEFORE APPROVAL OF SELECTIONS.—Under the grants to the Northern Pacific Railroad Company the Secretary of the Interior had no authority to withdraw or suspend from sale or entry lands within the indemnity limits of the grants which had not been previously selected with his approval, to supply deficiencies within the place limits of the grant, and such withdrawals and suspensions were ineffectual.
3. SAME—INDEMNITY LANDS OPEN TO ENTRY AND SALE UNTIL APPROVAL OF SELECTIONS.—Lands within the indemnity limits of these grants were open to entry and sale under the general land laws of the United States until the Secretary approved their selection by the grantee although the lists of their selection had been duly filed with the Land Department.
4. LAND DEPARTMENT—JURISDICTION AND POWER OF DISPOSITION OF PUBLIC LANDS NOT ARBITRARY BUT SUBJECT TO LAW AND JUDICIAL CORRECTION.—The jurisdiction and power of disposition of the public lands by the Land Department of

the United States is not arbitrary, unlimited or discretionary, but it is subject to and must be exercised in accordance with the laws of the land, and any violation or disregard of them by the Land Department is remediable in the courts.

5. SAME—PATENT TO LAND—COURTS MAY CHARGE TITLE UNDER WITH TRUST FOR RIGHTFUL CLAIMANT.—Whenever the officers of the Land Department have been induced by erroneous views of the law, by fraud or by clear mistake of fact, to issue a patent to the wrong party a court of equity, at the suit of the rightful claimant, may avoid the decision, charge the legal title under the patent with a trust in his favor and execute the trust.

6. SAME—INDEMNITY LANDS—SELECTION AGAINST ENTRY—FACTS—CONCLUSIONS.—The land in question was within indemnity limits under the grants to the Northern Pacific Railroad Company, (13 Stats., 365; 16 Stats., 378) and the Secretary had withdrawn and suspended it from entry and sale. The Company had filed its selection of this land but the Secretary had not approved it. Thereupon Jones entered and paid for it under the Timber and Stone Acts, 20 Stats. 89; 27 Stats. 348. Thereafter the Secretary approved the railroad company's selection and issued a patent for the land to that company.

Held: The entire beneficial interest and the equitable right to the land vested in Jones upon his completion of his purchase and the railroad company and its successors in interest held the title under the patent in trust for him and his grantees.

SANBORN, Circuit Judge, delivered the opinion of the court:

Hoyt, the complainant below, brought a suit in equity to obtain a decree that the defendants below, who were the grantees of the patentee, the Northern Pacific Railway Company, held the title to 40 acres of land in Minnesota in trust for him. The ground of his suit was that the Land Department of the United States, by reason of errors of law into which its officers had fallen, awarded and patented this land to the Railway Company when its legal duty required it to award and patent it to Jones, the grantee of the complainant. He rested his claim to relief on the established and familiar rule that if the officers of the Land Department are induced to issue a patent to the wrong party by erroneous views of the law, or by a fraudulent or gross mistake of the facts, the rightful claimant may avoid that decision and charge the legal title under the patent with a trust in his favor by a proper suit in equity. *James v. Germania Iron Co.*, 46 C. C. A. 476, 479, 107 Fed. 597, 600, and cases there cited. At the final hearing the court below was of the opinion that the officers of the Land Department had fallen into no error of law in the consideration and disposition of this land and it accordingly dismissed the bill, and the complainant appealed.

The claim of Jones to the title to this land arose under the Tim-

ber and Stone Acts of June 3, 1878 (20 Stats. 89) and of August 4, 1892 (27 Stats. 348) 2 U. S. Comp. Stats. 1545.

On December 17, 1897, he filed in the proper local land office his application to purchase this land under these acts and the local land officers received that application and accepted their fees for its filing. On the same day notice of this filing and that the applicant would present his proof thereunder on March 22, 1898, was issued by the register of the local land office and on the next day it was posted and published. The land lay coterminous with the line of the railroad between Duluth and Ashland within the second indemnity limits of the grant to the Northern Pacific Railroad Company under the Act of July 2, 1864, 13 Stats. 365, Chap. 217, and the joint resolution of May 31, 1870, 16 Stats. 378. The Secretary of the Interior had withdrawn it from entry and sale prior to 1894. The Company had filed on October 17, 1883, with the officers of the local land office at Duluth, and they had accepted, a selection of this and other lands in bulk in lieu of lands claimed by it to have been lost within the place limits of its grant. In 1893 is rearranged this selection and specified the particular tract lost in lieu of which it claimed each tract upon this list of selected lands. On August 27, 1896, the Secretary of the Interior erroneously decided that the eastern terminus of the Northern Pacific Railroad was at Duluth. 23 L. D. 204; *Doherty v. Northern Pacific Ry. Co.*, 177 U. S. 421; *United States v. Northern Pacific R. R. Co.*, 177 U. S. 435. On March 22, 1897, he caused the Company's selections of this and other lands coterminous with the line of railroad east of Duluth to be cancelled and on or before July 17, 1897, he restored all this land to the public domain and made it subject to disposal under the Timber and Stone Acts, the Homestead and other general laws for the disposition of the public lands. 25 L. D. 48; 34 L. D. 105. On February 28, 1898, he suspended these lands from entry pending the judicial determination of the location of the eastern terminus of the railroad but directed that in all cases where entries had been theretofore allowed parties should be permitted to complete the same by making proof thereof, but that the issue of patents should be suspended until such judicial determination. 26 L. D. 265, 488. On March 22, 1898, Jones made plenary proof and on December 10, 1898, he bought and paid for the land in question in strict accordance with the provisions of the Timber and Stone Acts, and the receiver of the local land office issued the customary receiver's receipt to him, save that he wrote across the face of it in red ink "This receipt is issued under the order of the Secretary of the Interior dated February 28, 1898, subject to any claim the Northern Pacific Railroad Company may have to the lands herein described." The Supreme Court decided that the eastern terminus of the Northern Pacific Railroad was at Ashland on April 16, 1900. On July 12, 1900, the Secretary restored to the records of the Land Department the selections made by the Company of this and other lands coterminous with the portion of the line of the railroad east of Duluth, because the courts had decided that the eastern terminus of the road was at Ashland, and directed that these selections should be "considered upon their

legality otherwise and in connection with any conflicting claims." He never approved the selections by the Company of this land, or of any land coterminous with the line of its railroad east of Duluth until months after Jones had entered and paid for the land which is the subject of this litigation. In 1905 he sustained a decision of the commissioner of the general land office that the entry of Jones should be cancelled, and he subsequently caused a patent of the land to issue to the Railway Company, 35 L. D. 105.

The complainant contends that this decision and action were induced by erroneous views of the law, in that the Secretary held (1) that the Northern Pacific Railway Company had succeeded to the rights of the Northern Pacific Railroad Company to this land under the latter's land grant, (2) that the company had sustained a legal loss of the tract of land in lieu of which the land in controversy was selected, (3) that it could lawfully select the latter although this tract was not on the same side of the railroad as the former and was not the nearest unappropriated land to it, (4) that the complainant was not entitled to the land by virtue of the provisions of the Act of July 1, 1898, 30 Stats. 620, and (5) that the entry of and payment for the land by Jones conferred upon him no equitable right to the land superior to that of the Railway Company. The last specification will be first considered because if it is well founded the complainant was entitled to a decree below although the first four specifications he urges were baseless. In the discussion of the questions here presented no distinction will be made between the Railroad Company and the Railway Company but it will be assumed that the latter has succeeded to all the rights of the former and the companies will be called the Railway Company.

The claim of the Railway Company to this land is founded on the joint resolution of May 31, 1870, which provided that it should be entitled, under the direction of the Secretary of the Interior, to as many sections of land within ten miles on each side of its road beyond the limits prescribed in its charter of July 2, 1864, 13 Stats. 370, as would make up the deficiency in the lands within the place limits of its grant which was specified in the resolution. All the land granted by this resolution was indemnity land. None of it was within the place limits of the grant or what is ordinarily termed granted land. The right of a railroad company to granted land vests in the grantee on the filing of the map of definite location approved by the proper government officer. Its right to indemnity land vests on the approval of its selection by the Secretary of the Interior. The same rules of law govern the inception by this Railway Company of an equitable right to a particular tract of indemnity land under the resolution of 1870 that condition the inception of such a right under its charter of 1864, and the Supreme Court has adjudged that these principles control the initiation of such a right.

"That no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior;

"That up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections,

are subject to be disposed of by the United States or to be settled upon and occupied under the pre-emption and homestead laws of the United States; and,

"That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road." *Sjoli v. Dreschel*, 199 U. S. 564, 565.

How can the claim of Jones be denied without a violation of these principles. No approval of any selection of this land by the Railway Company was ever made by the Secretary until after Jones had entered, purchased and paid for it and hence no right ever attached in favor of the company. The endorsement upon Jones' receiver's receipt that it was issued subject to any claim that the Northern Pacific Railroad Company might have to the land described in it was ineffective, because that Company had and could have no legal or equitable claim to it against such a purchaser. *Ryan v. Railroad Co.*, 99 U. S. 382, 388; *St. Paul Railroad v. Winona Railroad*, 112 U. S. 720, 731; *Barney v. Winona etc. R. R. Co.*, 117 U. S. 228, 232; *Wisconsin Railroad Co. v. Price County*, 133 U. S. 496, 512; *Oregon etc. R. R. Co. v. United States*, 189 U. S. 103, 112, 113; *New Orleans Pacific Railway Co. v. Parker*, 143 U. S. 42, 58.

Upon the filing of the map of definite location from Thomson Junction to Ashland this and other indemnity land was withdrawn from sale and entry by the Secretary of the Interior. *Humbird v. Avery*, 195 U. S. 480, 482. On or before July 17, 1897, these lands were restored to entry and sale (25 L. D. 48; 34 L. D. 105) and on February 28, 1898, they were suspended from entry by direction of the Secretary, except that those who, like Jones, had been allowed to enter land were permitted to make proof and payment. But the Secretary's original withdrawal and his subsequent suspension were alike futile. He was without lawful authority to make either and the lands always remained open to entry and sale under the Timber and Stone Act, the Homestead, the Pre-emption and the other general laws for the disposition of the public lands until each particular tract was either sold thereunder or the Secretary approved its selection by the Railway Company. *Hewitt v. Schultz*, 180 U. S. 139; *Nelson v. Northern Pacific Railway*, 188 U. S. 108; *Oregon etc. R. R. v. United States*, 189 U. S. 103, 110.

Before the Secretary approved the Company's selection of this land Jones, a qualified entryman, entered, purchased and paid for it in strict accordance with the provisions of the Stone and Timber Act, and obtained his receiver's receipt therefor. From the moment of that purchase this land became the property of Jones and it was no longer the land of the United States. He was the owner of the entire beneficial interest in and of the equitable title to it and the only title remaining in the United States was the naked legal title which it held in trust for him. *Carroll v. Safford*, 3 How. 441, 460, 461; *Witherspoon v. Duncan*, 4 Wall. 210, 218, 219; *Wisconsin Railroad Co. v. Price County*, 133 U. S. 496, 506.

Jones completed his purchase and obtained his receipt on De-

cember 10, 1898. His entry was not cancelled until some time subsequent to August 30, 1905, pursuant to the decision of the Secretary of the Interior made on that day and the patent was finally issued on October 18, 1905. The defendants purchased of the Railway Company on January 19, 1900, many years before Jones' entry was cancelled. They were not, therefore, *bona fide* purchasers without notice but they were purchasers from the United States through the Railway Company with full notice of the equitable right of Jones and they stand in the shoes of their grantor the United States. As the United States never after December 10, 1898, had anything but the legal title to this land which it held in trust for Jones and his assigns these defendants have nothing more.

Counsel for the defendants contends that the foregoing application of the rules of law which have been stated to the facts of this case is incorrect because the facts in *Sjoli v. Dreschel*, 199 U. S. 564, differ from those in the case at bar in that Sjoli occupied his land as a homesteader before the Railroad Company filed its list of selections and the Company's selection of Sjoli's land was never approved. But the rules of law announced in Sjoli's case were established by prior decisions of the Supreme Court, some of which have been cited, and it is those rules restated and reaffirmed in Sjoli's case and not the particular facts in that suit which determine the controversy before us. Moreover, the decisive facts of the two cases are the same in legal effect. Sjoli initiated his equitable right to his land by settlement upon it in 1884, while it was withdrawn from entry and sale under the grant to the Northern Pacific Railroad Company by an order of the Secretary made in 1871 (*Sjoli v. Dreschel*, 90 Minn. 108) and the Supreme Court held that withdrawal void and disregarded it as the law requires that the withdrawal and the suspension from entry of Jones' land before the Railroad Company's selection was approved by the Secretary, shall be held and disregarded in the case at bar. The Railroad Company filed its selection of Sjoli's land in June, 1885, but it was rejected by the officers of the Land Department. Sjoli's application to enter the land upon which his patent was founded was not filed until 1895 and the Minnesota Supreme Court held that the Secretary ought to have approved the Railroad Company's selection, that as the Company had done all in its power to secure the land its right to it was established by and dated from the filing of its selection and that Sjoli's subsequent entry and patent gave him no right to or interest in it. But the Supreme Court held that the Railroad Company acquired no right to the land by filing its selection until that selection was approved by the Secretary, just as the law now requires that the selection of Jones' land unapproved by the Secretary until after Jones entered and purchased it, shall be held to have initiated no right of the Railway Company thereto. The Supreme Court said:

"But, as already stated, the result of the cases in this court is that the Railroad Company did not acquire an interest in any particular lands within the indemnity limits merely by filing its lists of selections nor until its selections were approved by the Secretary of the Interior. * * * The Company's unapproved selections

did not, therefore, stand in the way of the lands being occupied and entered under the homestead laws. The mere filing of its lists of selections of indemnity lands did not have the effect to exclude them from occupancy under the pre-emption or homestead laws. On the contrary, notwithstanding the filing of such lists, they remained open, as before, to settlement or occupancy under those laws, until the selections were formally approved by the Secretary of the Interior and the lands withdrawn from settlement or sale. No such approval ever occurred." *Sjoli v. Dreschel*, 199 U. S. 564, 568.

Counsel says that when the Supreme Court said that "notwithstanding the filing of such lists, they remained open, as before, to settlement or occupancy under those laws, until the selections were formally approved by the Secretary of the Interior and the lands withdrawn from settlement or sale" it did not mean that the Secretary is without jurisdiction to approve a selection, because a settler under the Pre-emption or Homestead laws claims the land or files an application for it, but that its meaning was that in such a case the land is within the jurisdiction of the Land Department which may, if the facts warrant it, award it to the claimant under the settlement laws and that a mere filing of a claim to such land under the latter laws does not deprive the Secretary of jurisdiction to approve the selection made by the Railway Company. Let that proposition be conceded. The question here is not the jurisdiction but the legality of the decision of the Land Department and especially of the Secretary, its head, whereby he awarded this land to the Railway Company. The facts and the law warranted and required its award and sale to Jones. When he presented his application to purchase it under the Timber and Stone Act the Railway Company's selection of it was unapproved by the Secretary and that Company was without equitable right to it. The Land Department had jurisdiction to accept the application of Jones and to sell the land to him, or to approve the selection of the Company and to award the land to it. It exercised this jurisdiction, accepted the application of Jones, permitted him to enter the land, to prove up his claim to it, sold it to him, took his $100.00 in payment for it and issued to him his receiver's receipt and it did all this before the selection of the Company was approved and before the Company could acquire any right to the land. Jones' equitable title to the tract had then vested, and while the jurisdiction of the Land Department continued until the patent issued its power was neither arbitrary, unlimited nor discretionary, and its action was subject to judicial correction for error of law, fraud or clear mistake. The jurisdiction and power of disposition which the Land Department has of the lands of the United States, like the power of every other department of the government, is subject to the laws of the land, and the Land Department's violation or disregard of them is remediable in the courts. Its power "cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other lawfully ac-

quired property. Any attempted deprivation in that way will be corrected whenever the matter is presented so that the judiciary can act upon it." *Cornelius v. Kessel*, 128 U. S. 456, 461; *Germania Iron Co. v. James*, 89 Fed. 811 818, 32 C. C. A. 348, 354, 355; *James v. Germania Iron Co.*, 46 C. C. A. 476, 481, 107 Fed. 597, 602; *Black v. Jackson*, 177 U. S. 349, 357; *Orchard v. Alexander*, 157 U. S. 372, 383; *Brown v. Hitchcock*, 173 U. S. 473, 478.

There is nothing in the opinion in *Humbird v. Avery*, 195 U. S. 480, inconsistent with the views which have been expressed. The Supreme Court held in that case that the lands there in controversy were subject to the provisions of the Act of July 1, 1898, (30 Stats. 597, 620, Chap. 546) and were still within the power of the Land Department which had not then finally decided the questions properly before it concerning them and hence that the suit was premature. Counsel for the defendants asserts, and the fact is conceded, that the land here in question is not subject to the Act of 1898, and the Land Department had finally decided all questions regarding this tract that were before it and had issued a patent for it before this bill was exhibited.

Attention is called to an opinion of the Attorney-General, Opinions of the Attorneys-General, Vol. 25, page 632, in which may be found an intimation that the title of a railroad company, upon an approval by the Secretary after a sale of a tract of land to a purchaser under the general land laws, of its selection of it filed before such sale, relates back to the date of the grant and divests the right of the purchaser to the land. No other authority in support of that theory has been discovered. The decisions of the Supreme Court limit the right and title to indemnity land to the date of the approval of the selection and even if the theory could be sustained its effect would be limited to lawful approvals and the approval of the selection of this tract was illegal because the tract was not the property of the United States and was not open to selection by the Company at the time of the approval.

Finally counsel invokes the familiar rule that the decisions of officers of other departments of the government upon questions within their jurisdiction are cogent and persuasive and should be followed by the courts unless they are clearly erroneous, and he reminds us that the Secretary of the Interior and the Commissioner of the General Land Office have carefully considered the questions in this case and have decided that Jones was without legal or equitable claim to this land and that the right of the Railway Company to it was superior. But Jones was a qualified entryman. The attempted withdrawals and selections of the land by the Secretary prior to his approval of the Company's selection were unauthorized by law and without legal effect. The land was open to entry and purchase until he approved the selection. Jones entered, bought and paid for it before any such approval was made. And the decisions of the Supreme Court which have been cited leave no doubt that the Secretary and the Commissioner fell into a plain error of law when they took the land which Jones had lawfully purchased from him or from his grantees and gave it to the Railway Com-

pany. Erroneous decisions of questions of law by the officers of the Land Department cannot be permitted to deprive the equitable owner of his vested right to lands which he has lawfully purchased from the United States. *Johnson v. Towsley*, 13 Wall. 72, 80; *Gibson v. Chouteau*, 13 Wall. 92, 102; *Shepley v. Cowen*, 91 U. S. 330, 340; *Moore v. Robbins*, 96 U. S. 530, 536; *St. Paul R. R. Co. v. Winona Railroad*, 112 U. S. 720, 733.

The conclusion is that by his entry and purchase Jones acquired the entire beneficial ownership and the equitable right to the land in controversy and that the Railway Company and its successors in interest obtained nothing under the patent but the naked legal title which they held in trust for him and for his successors in interest. This conclusion renders the other questions presented in this case immaterial. The decree must accordingly be reversed and the case must be remanded to the court below with directions to enter a decree for the complainant for the relief prayed in the bill, and

It is so Ordered.

Filed April 17, 1908.

(*Decree.*)

And on the seventeenth day of April, A. D. 1908, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1907.

FRIDAY, *April* 17, 1908.

No. 2637.

HERBERT H. HOYT, Appellant,
vs.
FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed with costs; and that Herbert H. Hoyt have and recover against Frederick Weyerhaeuser and John A. Humbird the sum of Three Hundred Fifty-One and 75/100 Dollars for his costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court with directions for further pro-

ceedings not inconsistent with the views expressed in the opinion of this Court.

April 17, 1908.

This decree modified and amended by order of Court entered May 22, 1908.

(Motion of Appellees to Modify Direction in Opinion and Decree.)

And on the eighteenth day of May, A. D. 1908, a motion of appellees to modify direction in opinion and decree was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2637, December Term, A. D. 1907.

HERBERT H. HOYT, Appellant,
vs.
FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Appellees.

The opinion filed by the Court upon the 17th of April concludes as follows:

"The conclusion is that by his entry and purchase Jones acquired the entire beneficial ownership and the equitable right to the land in controversy and that the Railway Company and its successors in interest obtained nothing under the patent but the naked legal title which they held in trust for him and for his successors in interest. This conclusion renders the other questions presented in this case immaterial. The decree must accordingly be reversed and the case must be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion, and it is so ordered."

The opinion in fact disposes of the case and was so intended. No decree in the Circuit Court is possible except a decree granting all the relief prayed in the bill.

It is therefore suggested that the Court ought to change its direction so that the clause "for further proceedings not inconsistent with the views expressed in this opinion" shall read as follows: "with directions to enter a decree for the plaintiff as prayed for in the complaint."

These suggestions are made because counsel is of the opinion that it is very doubtful if remanding the case to the court below for further proceedings consistent with the opinion of this Court is a final and appealable decree.

Bostwick v. Brinkerhoff, 106 U. S. 3;
Union Mutual Life Ins. Co. v. Kirchoff, 160 U. S. 374;
Hazeltine v. Central Bank of Springfield, 183 U. S. 130;
MacFarland v. Byrnes, 187 U. S. 246;
MacFarland v. Brown, 187 U. S. 239.

Counsel desires a final decree which will at once be appealable.

Respectfully submitted,

CHARLES W. BUNN,
For Appellees.

(Endorsed:) No. 2637. Herbert H. Hoyt, Appellant, *vs.* Frederick Weyerhaeuser, *et al.* Motion Appellees to modify direction in opinion and decree. Filed May 18, 1908. John D. Jordan, Clerk.

(Order Modifying Opinion and Decree.)

And on the twenty-second day of May, A. D. 1908, in the record of the proceedings of said Circuit Court of Appeals is an order modifying the opinion and decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1908.

FRIDAY, *May* 22, 1908.

No. 2637.

HERBERT H. HOYT, Appellant,
vs.
FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This cause came on to be heard upon the motion of Appellees for an order modifying the opinion and decree of this Court.

On Consideration Whereof, it appearing that said motion was filed within the time prescribed by the rules of this Court for the filing of a petition for a rehearing, it is now here ordered that said motion of Appellees be, and the same is hereby, granted.

It is further ordered, in pursuance of said motion, that there be stricken from the opinion and the decree of this Court the words in the last paragraph, to-wit: "for further proceedings not inconsistent with the views expressed in this opinion," and that in lieu thereof the following words be inserted therein, after the word "below" in said last paragraph, viz: "with directions to enter a decree for the complainant for the relief prayed in the bill."

May 22, 1908.

(Petition and Order Allowing Appeal to Supreme Court of the United States.)

And on the tenth day of June, A. D. 1908, a petition and order allowing appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

HERBERT H. HOYT, Appellant,
vs.
FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Appellees.

The above named Frederick Weyerhaeuser and John A. Humbird conceiving themselves aggrieved by the order and decree entered on May 22, 1908, in the above entitled proceeding, do hereby appeal from said decree to the Supreme Court of the United States, and they pray that this their appeal, may be allowed; and that a transcript of the record and proceedings and papers upon which said decree was made together with the assignment of errors herewith filed, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES W. BUNN,
Solicitor for Frederick Weyerhaeuser and John A. Humbird, Saint Paul, Minnesota.

June 9, 1908.

And now, to-wit, on June 10, 1908, it is ordered that the appeal be allowed as prayed for.

WALTER H. SANBORN,
Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. Herbert H. Hoyt, *vs.* Frederick Weyerhaeuser and John A. Humbird. Petition and Order allowing appeal to Supreme Court, U. S. Filed Jun- 10, 1908. John D. Jordan, Clerk. C. W. Bunn, Attorney for Appellees, St. Paul, Minnesota.

(Assignment of Errors on Appeal to Supreme Court of the United States.)

And on the tenth day of June, A. D. 1908, an assignment of errors on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

HERBERT H. HOYT, Appellant,
vs.
FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Appellees.

Now come the above Frederick Weyerhaeuser and John A. Humbird and say that in the decree entered in this court in the above entitled cause on the 22nd of May, 1908, there was manifest error in that:

1. The court erred in decreeing that the said Frederick Weyerhaeuser and John A. Humbird held the title to the premises in controversy as trustees for the said Herbert H. Hoyt.

2. The court erred in decreeing that the selection of the premises in controversy made by the Northern Pacific Railroad Company was, although approved by the Secretary of the Interior and followed by a patent, subordinate in equity to the attempted entry and purchase of the said premises made long afterward by the grantor of the said Herbert H. Hoyt.

3. The court erred in decreeing that because of the attempted entry and purchase of the premises in controversy by the grantor of the said Herbert H. Hoyt the Secretary of the Interior was without jurisdiction to approve the selection previously filed by the Northern Pacific Railroad Company and issue the patent to said premises upon such approval.

4. The court erred in decreeing that the said entry of the Northern Pacific Railroad Company, when approved by the Secretary of the Interior, did not relate back to the making of the entry.

CHARLES W. BUNN,
Solicitor for Appellees, Frederick Weyerhaeuser and John A. Humbird.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. Herbert H. Hoyt *vs.* Frederick Weyerhaeuser and John A. Humbird. Assignment of Errors on appeal to Supreme Court, U. S. Filed Jun- 10, 1908, John D. Jordan, Clerk. C. W. Bunn, Attorney for Appellees, St. Paul, Minnesota.

(*Bond on Appeal to the Supreme Court of the United States.*)

And on the tenth day of June, A. D. 1908, a bond on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

HERBERT H. HOYT, Appellant,

vs.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Appellees.

Know all men by these presents, That we, John A. Humbird, of Saint Paul, Minnesota, and the National Surety Company, a corpo-ation organized and existing under the laws of the state of New York, are held and firmly bound unto Herbert H. Hoyt in the sum of One Thousand Dollars to be paid to the said Herbert H. Hoyt for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated the 9th day of June A. D. 1908.

Whereas, The above named Frederick Weyerhaeuser and John A. Humbird have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit by the Circuit Court of Appeals of the United States for the Eighth Circuit:

Now therefore, the condition of this obligation is such that if the above named Frederick Weyerhaeuser and John A. Humbird shall prosecute said appeal to effect and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN A. HUMBIRD,
By CHARLES W. BUNN,
His Att'y in Fact.

NATIONAL SURETY COMPANY,
[SEAL.] By W. S. McCURDY,
Its Attorney in Fact.

L. A. GREEN,
H. J. LOFGREN,
As to Surety.

STATE OF MINNESOTA, *County of Ramsey, ss:*

On this 9th day of June, 1908, before me personally appeared W. S. McCurdy, Attorney in fact of the National Surety Company, the above named corporation, with whom I am personally acquainted, who, being by me duly sworn, said: That he is Attorney in fact of said corporation, the National Surety Company, that he knows the corporate seal, that it was affixed by order of the Board of Directors of said corporation, and that he signed said instrument as Attorney in fact of said corporation by like authority and the said W. C. McCurdy acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] A. H. MARTIN,
Notary Public, Ramsey County, Minnesota.

My Commission expires July 12, 1914.

Approved as a Supersedeas:
WALTER H. SANBORN,
Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. Herbert H. Hoyt, *vs.* Frederick Weyerhaeuser and John A. Humbird. Bond on Appeal to Supreme Court, U. S. C. W. Bunn, Attorney for Appellees, St. Paul, Minnesota. Filed Jun- 10, 1908, John D. Jordan, Clerk.

(*Citation.*)

And on the thirteenth day of June, A. D. 1908, a citation on appeal to the Supreme Court of the United States was filed in said cause, the original of which, with the admission of service endorsed thereon, is hereto attached and herewith returned:

THE UNITED STATES OF AMERICA:

To Herbert H. Hoyt, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, D. C., thirty days from and after the day this Citation bears date, pursuant to an appeal, filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein Frederick Weyerhaeuser and John A. Humbird are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, at the City of Saint Paul, Minnesota, this 10th day of June in the year of our Lord one thousand nine hundred and eight.

WALTER H. SANBORN,
Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

Due service of this instrument and receipt of copy thereof admitted at Duluth Minnesota this 11th day of June 1908.

H. H. HOYT,
Counsel & Solicitor for Appellee.

[Endorsed:] U. S. Circuit Court of Appeals Eighth Circuit. Herbert H. Hoyt *vs.* Frederick Weyerhaeuser and John A. Humbird. Citation. Filed Jun- 13, 1908. John D. Jordan, Clerk.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals, in a certain cause in said Court

wherein Herbert H. Hoyt is Appellant and Frederick Weyerhaeuser and John A. Humbird are Appellees, as full, true and complete as the originals of the same now remain on file and of record in my office.

I do further certify that the original citation, with the admission of service endorsed thereon, is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this sixth day of June, A. D. 1908.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 21,254. U. S. circuit court appeals, 8th circuit. Term No. 458. Frederick Weyerhaeuser and John A. Humbird, appellants, *vs.* Herbert H. Hoyt. Filed July 8th, 1908. File No. 21,254.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1910.

No. [redacted] 12.

CHARLES D. CAMPBELL, APPELLANT,

vs.

FREDERICK WEYERHAEUSER AND JOHN A. HUMBIRD.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JUNE 12, 1908.

(21,226.)

(21,226.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 430.

CHARLES D. CAMPBELL, APPELLANT,

vs.

FREDERICK WEYERHAEUSER AND JOHN A. HUMBIRD.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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1 United States Circuit Court, District of Minnesota, Fifth Division.

Charles D. Campbell, Complainant.
No. 507. vs. In Equity.
Frederick Weyerhaeuser and John A. Humbird, Defendants.

Appearances: H. H. Hoyt, Duluth, Minnesota, Solicitor for Complainant.

C. W. Bunn and James B. Kerr, St. Paul, Minnesota, Solicitors for Defendants.

Pleas in the United States Circuit Court, District of Minnesota, Fifth Division, in the above entitled cause.

Be it remembered, That on the 6th day of May, A. D. 1907, there was filed with the Clerk of said Court at his office in Duluth, said District and Division, a stipulation withdrawing certain exhibits from the records and files in said cause; and that on the same day Orders of the Court permitting the withdrawal of said Exhibits were duly entered in the Term Minutes of said Court, in said cause; which said stipulation and orders are, in the words and figures, as follows, to-wit:

2 Charles D. Campbell,
No. 507. vs. In Equity.
John A. Humbird and Frederick Weyerhaeuser.

It is stipulated by and between the respective parties to the above entitled cause, as follows:

1.

That the complainant may withdraw from the records and exhibits Exhibit "P" except to the extent that that exhibit is copied into the record at pages 141, 142 and 143.

2.

That defendant's Exhibit "10" may be withdrawn, it being the same as appears in the printed regulations of the Secretary in the 28th volume of the land office decisions commencing on page 103 of that volume, the copy of said circular thus appearing may be considered in evidence in this case.

3.

That defendant's Exhibit "11" may be withdrawn, and that the following shall be taken as a correct statement of the facts shown by that exhibit in so far as it affects this cause:

That Exhibit "11" is a copy of Northern Pacific Railroad Company's selection list No. 15, filed at Duluth, Minnesota, October 17, 1883. That in said list there was selected 43,548.12 acres of land including the SE¼ of section 21, township 54 north, range 12 west, the land here in suit. This list specified losses in bulk, i. e. it stated the losses by specific descriptions, and the selections by specific descriptions, each footing up the same number of acres; but it did not assign each selection to a particular loss.

4.

This selection list was accepted by the Register and Receiver and transmitted to the general land office. That attached to this list were two certificates, one of which copied
3 into the record at page 139, and the other of which is as follows:

United States Land Office, Duluth, Minn., Oct. 17, 1883.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Northern Pacific Railroad Company, under the grant to the said company by act of Congress approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad Company by Chas. B. Lamborn, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and within the limit of 10 miles on each side; and that the same are not, nor is any part thereof returned and denominated as mineral land or lands, nor claimed as swamp lands; nor is there any homestead, preemption, state or any other valid claim to any portion of said lands on file or record in this office.

We further certify that the foregoing list shows an assessment of the fees payable to us, allowed by the act of Congress approved July 1, 1864, and contemplated by the circular of instructions dated January 21, 1867, addressed by the Commissioner of the General Land Office to Register and Receivers of the United States land offices; and that the said company have paid to the undersigned, the Receiver, the full sum of Five Hundred forty-four (544) Dollars in full payment and discharge of said fees.

(Sgd.) J. B. CAREY, Register.
W. W. SPAULDING, Receiver.

That defendant's Exhibit "12" may be withdrawn, and that the following shall be taken as a correct statement of the facts shown by that exhibit, in so far as it affects this cause.

That Exhibit "12" is a re-arrangement of list No. 15 referred to in paragraph 111 hereof. This re-arrangement was made by the railroad company pursuant to an order by the Secretary of the Interior, and the re-arranged list was filed in the Duluth land office on April 11, 1893. The reason for the re-arrangement was to specify a particular tract [lost] as the basis for each selection. In this re-arranged list there was set opposite the tract in controversy the SE¼ of section 19, township 133 north, range 34 west, Minnesota. That attached to this list was a certificate which is copied into the record at page 140.

H. H. HOYT,
Solicitor for Complainant.

4

C. W. BUNN,
Solicitor for Defendants.

In accordance with the foregoing stipulation it is, by the Court

Ordered: That Complainant herein be and he hereby is granted permission to withdraw complainant's Exhibit "P" from the records and files of said cause, and the Clerk of this Court is hereby directed to deliver said exhibit to the solicitor for complainant upon the delivery to him of a receipt therefor.

And it is, by the Court further

Ordered: That the defendants herein be and they hereby are permitted to withdraw from the records and files of said cause the following papers, to-wit: defendants' Exhibits Nos. 10, 11 and 12; and the Clerk of this Court is hereby directed to deliver said exhibits to the solicitor for defendants upon the delivery to him of a receipt therefor.

That theretofore, to-wit: on the 1st day of December, A. D. 1906, there was filed with said Clerk a transcript of the Record of said cause in the District Court of the Eleventh Judicial District, State of Minnesota, St. Louis County, in the words and figures following, to-wit:

5 District Court, Eleventh Judicial District.

State of Minnesota,
County of St. Louis—ss.

Charles D. Campbell, Plaintiff,
vs.
Frederick Weyerhaeuser and John A. Humbird, Defendants.

Complaint.

The plaintiff for his cause against the defendants, alleges:

I.

That at all of the times in this complaint mentioned, the land hereinafter described was, and now is unfit for cultivation, and valuable chiefly for the timber standing and growing thereon, and has no valuable deposit of gold, silver, cinnebar, copper or coal, and that the land is now in a state of nature, uninhabited, and contains no mining or other improvements.

II.

That on or about the 26th day of October, 1895, Charles D. Campbell, the above named plaintiff, who was then and there a naturalized citizen of the United States, over the age of twenty-one years, and in all respects duly qual-
6 ified to enter land, desiring to avail himself of the provisions of the act of Congress entitled "An Act for the Sale of Timber Lands in the States of California, Oregon, Nevada, and in Washington Territory" approved June 3, 1878, as amended by act of August 4, 1892, extending the benefits of the former act to all the public land states, did on said day, go to the local land office at Duluth, in the State of Minnesota, the same being the proper land office in the land district in which said land was situated, and said plaintiff being then and there legally entitled to purchase said land under the laws of the United States, tendered his application to purchase the South East 1/4 of Section twenty-one (21) in township fifty-four (54) north, of range twelve (12) west of the 4th principal meridian, Duluth Land District. Said land was at that time unoffered Government land, situated in St. Louis County, State of Minnesota, in the district of public lands subject to sale and entry at the United States local land office at Duluth aforesaid, and was at this date unoccupied public land, subject to sale under the provisions of the act of Congress above referred to. He tendered his written statement in form as required by law, the same being duly sworn to, together with the tender of all proper and legal fees of said land office for such complete filing and entry, to the register and receiver of said local land office, and demanded of them to receive and file his said application to purchase, and that they issue the notice provided by law fixing the time and place where the plaintiff should produce his witnesses to make his final proof under the provisions of said act, which was refused by said officers for the alleged reason that
7 such application conflicted with the Northern Pacific Railroad Co. selection of said land as shown by list No. 15, filed by said company. The said plaintiff Charles D. Campbell appealed from such order of rejection to the Commissioner of the General Land Office at Washington,

D. C. Subsequently and while such appeal was pending and undecided before said Commissioner, this plaintiff, on November 9, 1896, renewed his application to purchase said land, which was again refused by the local officers. The same being received and filed by the said local officers, and the written statement sent by them to the Commissioner of the General Land Office. And on the 28th day of December, 1897, the said plaintiff did again renew his application to purchase said land, and again the local officers refused to allow this plaintiff's application to purchase said land, but received and filed the application, and forwarded the same to the Commissioner of the General Land Office. All of which facts appear of record in the office of the Commissioner of the General Land Office at Washington, to which reference is hereby made. A copy of each of said applications are hereto annexed, marked Exhibits "A," "B" and "C," and hereby made a part of this complaint.

And the plaintiff further says that in each of the written statements referred to as Exhibit "A," "B" and "C," is set forth that the said land was then unfit for cultivation, and was valuable chiefly for its timber; that it was uninhabited, and had no mining or other improvements, or any valuable deposit of gold, silver, cinnabar, copper or coal. Said written statement further set forth, that the said plaintiff Charles D. Campbell had made no other application under said act of Congress, and that he did not apply to purchase said land on speculation, but in good faith, to appropriate it to his own exclusive use and benefit; and that he had not directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whomsoever, by which the title he might acquire from the Government of the United States should inure to the benefit of any person except himself. Each of said statements at the date apearing thereon, were signed by Charles D. Campbell, said plaintiff, and were verified by his oath before the Register or Receiver of said United States land office of the Duluth Land District (in which district the land was situated), and each one of said statements (being made in duplicate), signed and verified by the said applicant, was by the receiver of said land office transmitted forthwith to the General Land Office at Washington.

And the plaintiff further says that on or about the 3rd day of October, 1901, the Commissioner of the General Land Office, having before him all the papers above referred to, proceeded to adjudge and determine the claim and rights of Charles D. Campbell to the land above described. A copy

of his decision addressed to the Register and Receiver, is as follows:

"October 17, 1883, the Northern Pacific Railroad (now Railway) Company, selected E1/2 of NE1/4, SW1/4 of NE1/4 and SE1/4 of Sec. 21, T. 54, N., R. 12 W., per list
9 15, rearranged list 15 B, for second indemnity in lieu of lands in section 17, and 19, T. 133 N., R. 34, in the primary limits of the grant, but disposed of between the date thereof and the definite location of the road. Said selection has not since been abandoned, nor the basis otherwise used.

"This selection, however, was canceled by letter of March 22, 1897, because the land is east of Duluth, the then eastern terminus of the grant under departmental ruling; subsequently the United States Supreme Court decided 177 U. S., 435, that the grant extended to Ashland, Wisconsin, and thereafter said cancellation was rescinded, and the selection restored by letter to you of May 26, 1900. October 5, 1895, John L. Brown applied to make Timber and Stone entry of E½ of NE¼; SW¼ of NE¼, which was refused by you and he appealed. Since that decision of the Court above referred to, Attorney for Brown has filed an argument for the purpose of showing the illegality of the company's selection, on the ground that it is not the nearest available land to the designated loss, and presents a list of tracts, 'Exhibit B', which it is claimed are in closer proximity to said basis. An examination of the records, however, show some of the tracts to have been selected as swamp, and others to have been selected by the company for other losses and hence were not available in the present case. Since said argument was filed, Mr. Brown has submitted petition for a hearing claiming that the basis so offered for the selection is without right or foundation for patent.

10 "The status of basis for the company's selection is a matter entirely of record evidence, and not the subject of parole testimony. I can see no reason, therefore, for a hearing and the [the] same is denied.

"October 26, 1895, Charles D. Campbell filed application for timber and stone entry of the said SE¼, which was also refused by you because of company's selections, and he also appealed. A like argument as in Brown's case has been filed by the same attorney in behalf of Campbell, and Campbell has also made a like request for a hearing, and what is said and decided as to Brown's case applies also to Campbell's. Both of these claims rest solely upon the application to purchase, and are therefore not within the act of July 1, 1898 (Depart-

mental decision May 22, 1900, Salter v. Co.). I therefore hold the Company's selections as valid, and reject the applications of Brown and Campbell, subject to appeal.

"September 17, 1896, Louis L. Amundson presented his application to make homestead entry of the W½ of SE¼ and SW¼ of NE¼ of said section, which was rejected by you for conflict with the company's selection and prior application of Campbell and Brown, from which action Amundson appealed. September 12, 1896, Frank P. Keating presented his application for homestead entry of E½ of NE¼ and E½ of SE¼ of said section, which was also refused, and he appealed. January 18, 1898, Keating renewed his application and alleges settlement on the land October 22, 1897, by building
11 a house.

"Under date of August 31, 1900, this office passed upon the rights of all these parties, rejecting as has been done in this letter, the claim of Brown, and Campbell, and deciding as to Amundson and Keating, that the former not alleging any settlement on the land prior to the tendering of his application, his case is not within the act of July 1, 1898, and with respect to Keating, that his second application is equivalent to a waiver of all claims under his first one and his allegation of settlement if continuously maintained would appear to bring his claim to the land under the provisions of the act of July 1, 1898, and you were directed to notify him that he would be allowed the option accorded by law, and to require him if he is still maintaining his claim as therein required, to make proof of such continued maintenance, and to exercise his option within sixty days from receipt of said notice. By letter to you of October 9, 1900, however, action on said decision was suspended to await determination by the Department of the claims of the company to land in the second indemnity belt.

"That question has been disposed of, and the right of the company to the land in question is herein set out and determined in its favor.

"I see no reason, therefore, for disturbing said decision of August 31, 1900, and pursuant thereto you will notify Mr. Keating, allowing him sixty days from notice within which to submit his election under the act of July 1, 1898.

12 "The rejection of Amundson's application for the W½ of SE¼ and SW¼ of NE¼ is subject to appeal by him, and you will so inform him."

III.

And the plaintiff further says, that it appears from the decision of the Commissioner that he, the plaintiff, was the first applicant for said land. That subsequently one Frank P. Keating presented his application for homestead entry of E½ of SE¼ and E½ of NE¼ of said section, and Louis L. Amundson applied to make homestead entry of the W½ of SE¼ and SW¼ of NE¼ of said section, and that these adverse claims were before the Commissioner on appeal at the time of his decision. While the plaintiff's appeal to the Commissioner was pending, Keating relinquished his claim to the E½ of SE¼ of said section, and Louis L. Amundson relinquished his claim to the W½ of SE¼ of said section, so that the decision of the Commissioner as to the rights of the plaintiff to said land, was adverse to him on the sole ground that the land had been previously selected by the Northern Pacific Railroad Company, and that such selection was valid, and that Campbell did not come within the provisions of the act of July 1, 1898.

IV.

The plaintiff further says, that feeling himself aggrieved by the ruling of the Commissioner above recited, an appeal was duly taken from the Commissioner's decision to the Department, and on the 6th day of September, 1905, the Department of the Interior rendered its decision of which the following is a copy:

13 Department of the Interior,

Washington, September 6, 1905.

"John L. Brown and Charles D. Campbell.

vs.

"Northern Pacific Railway Co.

"The Commissioner of the General Land Office.

"Sir: "The Department has considered the appeals by John L. Brown and Charles D. Campbell from your office decision of October 31, 1901, sustaining the action of the local office in rejecting their applications to purchase under the timber and stone act of June 3, 1878, as follows: Brown's application proffered October 5, 1895, covering the E½ of NE¼ and SW¼, of NE¼, Sec. 21, T. 54 N., R. 12 W., Duluth Land District, Minnesota, and Charles D. Campbell's application filed October 26, 1895, to purchase the SE¼ of same section, these applications having been rejected for conflict with the prior right under an idemnity selection made of the lands applied for by the Northern Pacific Railroad Company October 17,

1883. The matters raised by the appeals are fully disposed of in departmental decision in the case of Eaton v. Northern Pacific Railway Co. (33 L. D. 426), and that of August 30, last in the case of Jones v. Northern Pacific Railway
14 Co. (34 L. D. 105), and for the reasons given in said decisions, these applications to purchase will stand rejected.

"The lands here involved were also applied for under the homestead law by Louis L. Amundson and Frank P. Keating. Amundson's application was rejected, and he has not appealed. Keating's claim was held to be subject to adjustment under the act of July 1, 1898 (30 Stat. 597, 620). He has since relinquished a portion of the land applied for. With regard to his claim, nothing is presented by the record calling for departmental consideration at this time."

A copy of the decision in the case of Jones v. Northern Pacific Railroad Company is hereto attached, and marked Exhibit "D", and made a part of this complaint.

V.

And the plaintiff further says that these decisions were made without any trial or hearing, and without any legal or competent evidence. That at the several times when the plaintiff tendered his application for said land, the land was a part of the public domain subject to appropriation; that neither of the several applications of the plaintiff for said land has ever been waived, cancelled or relinquished to the United States in any manner by the plaintiff; and that the order rejecting the plaintiff's application to purchase said land was without jurisdiction, and was, and is, void.

That the plaintiff has at all times been ready and willing to perfect his title to said land by doing all things
15 that the law requires of him, including the payment for the land, and would long ago have completed his entry by payment, had he not been prevented from so doing by reason of conflicting claims to the same, and subsequently the suspension by the Commissioner of the General Land Office of all further proceedings looking towards the completion of his entry, and the acquisition of the title to this land. Notwithstanding that the plaintiff has done all that the law required him to do, and was ready and willing to do all that the law might require of him to be done, he was prevented from further proceedings in this matter by the orders of the Land Department, and although he is still maintaining his claim to the land. A patent regular in form, dated and signed, was on the 13th day of November, 1905 issued conveying this land to

said company and this plaintiff avers that said patent was illegally, and unlawfully issued to said company.

That the Northern Pacific Railway Company, long before the issuing of said patent, had full knowledge and notice of the claim of the plaintiff to this land; and that such pretended cancellation of Campbell's claim was ineffectual and void.

VI.

And the plaintiff further says that the land in controversy in this suit, and heretofore described, is not within the original grant to the Northern Pacific Railroad Company conferred upon that road by the act of Congress dated July 2, 1864, but is embraced within the extended idemnity limits of said road by the joint-resolution of Congress dated May 31
16 1870, which declared that under certain conditions—

"The company shall be entitled under the direction of the Secretary of the Interior to receive so many sections of land belonging to the United States, and designated by odd numbers in such state or territory, within ten miles on each side of said road, beyond the limits prescribed by its charter as will make up such deficiency."

That the pretended selection of said land for indemnity for the loss of land within the place limits of the grant to the Northern Pacific Railroad Company, was illegal and void. The basis of such selection being the alleged loss of the SE¼ of section 19, T. 133 N., R. 31 W., which is two hundred miles west and fifty miles south of the land in controversy in this action; the lost lands being on the south side of the line of said railroad, while the land selected is on the north side of said railroad line. And the plaintiff charges that the Northern Pacific Railroad Company was not entitled to select lands for indemnity on one side of the road, for lands lost on the other side of the line of its road. That in order to make a valid selection of lands in lieu of lands lost within the primary limits of the Northern Pacific Railroad Co's., grant, certain things are required to be done. The list of selections must be made in accordance with the law and rules of the Department. If the list is not made in the manner prescribed, the preliminary proceedings are of no more effect than would be the filing of any other unauthorized paper in the local land office. The plaintiff claims that because of the wilful disregard of the law and rules of the Department by the Northern Pacific
17 Railroad Co., list No. 15 and list No. 15 B, are not effective to segregate the land selected, and are absolutely void for any purpose. Under the joint-resolution of May 31, 1870, the Northern Pacific Railroad Company should

receive no land within the second indemnity limits of its road, until it was made to appear that the quantity of lands in the first indemnity limits were insufficient to make up the deficiency. The selecting agent applying to make idemnity selections, is required to state in his affidavit attached to the list presented, that the specific lands for which indemnity is claimed are truly set forth in said list, and that said losses have not heretofore been indemnified in any manner; it must also appear that lands selected within the second indemnity limits of said railroad, were based upon losses in the place limits of the grant, subsequent to the date of the grant and prior to the definite location of the road; and where deficiencies exist for which indemnity is allowed by law, the lieu selections must be made from vacant, unappropriated lands, within proper sections and limits nearest the granted sections in which the loss occurred: None of these things which were required to be done, were done by the company in selecting this land in controversy; and the burden of showing these facts was upon the railroad company.

The list when filed in the land office, should have all things that are required by law and the rules of the Department, accompany the selection list in order to make a valid list. Between the Government and the railroad company, the Department, if so disposed (no other rights intervening), might waive these requirements; but the plaintiff denies the right of the Secretary when the list is before him, and the rights of private individuals may be affected, to waive any of these requirements for the benefit of a railroad company.

And the plaintiff further says, that there were at the date of the filing of the selection list above referred to, covering this land, many acres of vacant, unappropriated lands within proper sections and limits, within the first indemnity limits of this railroad, which should have been selected for the loss claimed to have arisen, and for which this land was selected as indemnity. And the plaintiff charges the fact to be, that between the lost land and the land selected as lieu in this controversy, there were at the date of the selection many thousand acres of vacant unappropriated lands, within proper sections and limits nearer the granted section in which the loss occurred than the land thus selected, that should have been selected as indemnity for said loss, instead of the land in controversy.

And the plaintiff further shows, that the affidavit required by the rules of the Department to be attached to the selection list by the selecting agent, and which is attached to list No. 15, filed October 17, 1883, is as follows:

State of Minnesota,
County of Ramsey—ss.

I, Charles B. Lamborn, being duly sworn, depose and say: That I am the Land Commissioner of the Northern Pacific Railroad Company; that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by said Northern Pacific Railroad company as enuring to said company to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the Northern route for which a land grant was made by the act of Congress approved July 2, 1864, and by the joint resolution approved May 31, 1870, that the said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands, and are of the character contemplated by the grant, being within the limits of forty miles on each side of the line of the route for a continuous distance of.....miles of said railroad, commencing .....and ending .....

CHAS. B. LAMBORN, [L. S.]

Sworn to and subscribed before me this 15th day of October, 1883.

[Seal] GEO. W. BOARD,
Notary Public.

And the plaintiff further shows that in this list of selections, no lost lands appeared; that subsequent to the filing of this list the Department required the Northern Pacific Railroad Company to rearrange said list tract for tract, so that it would show the lost lands for which indemnity was claimed; and on the 11th day of April, 1893, list No. 15 B. was filed in the local land office: The affidavit attached to said list is as follows:

"Whereas, the Northern Pacific Railroad Company has heretofore, to-wit, on the 17th day of October, 1883, duly selected under the directions of the Secretary of the Interior those certain tracts and parcels of land particularly set forth and described in Duluth list No. 15, filed in the United States District Land office at Duluth, Minnesota on the 17th day of October, 1883, as indemnity for certain tracts and parcels of odd-numbered sections of land within the limits of the grant to said railroad company, which said tracts were reserved, sold, granted or otherwise appropriated, or not free from pre-emption or other claims or rights at the time the line of its road was definitely located in accordance with the provisions of the act of Congress approved July 2, 1864, and of the joint-resolution of Congress approved May 31, 1870, which lands so situated are on and within forty miles of the line of said road, as so definitely located.

"And whereas, the Secretary of the Interior has since the filing of said above described list, further directed that said list shall be rearranged so it shall indicate the specific loss in lieu of which each specific selection has been made. Now, therefore, to comply with the further requirements of the Interior Department, but not waiving or abandoning rights and claims heretofore acquired by virtue of its selection heretofore made under the direction of the Secretary of the Interior, the said Northern Pacific Railroad Company has herein designated the lands heretofore selected as indemnity in said Duluth list No. 15, and no other lands, and has herein set opposite each specific description of land so selected the description of
21 the land lost from its grant in place, and in lieu of which such indemnity land is selected."

"St. Paul, Minn., April 10, 1893.

"CHAS. B. LAMBORN.
"Land Commissioner N. P. R. R. Co."

And the plaintiff further shows, that in list No. 15 the number of acres selected were 43,548.12 acres, while in list No. 15 B, the number of acres were 32,678.49 acres, an excess of 10,870 acres in list No. 15.

The plaintiff charges, from the facts above stated, that there was no valid selection of this land by the Northern Pacific Railroad Company, and denies the authority of the Secretary arbitrarily to confirm said list when interest adverse to the Northern Pacific Railway Company's selection appears.

VII.

And the plaintiff further shows, that under the order of the Secretary of the Interior dated May 28, 1883, list No. 15 was made, and from the lands described in said list, the Secretary was to select lieu lands in place of lands lost to the railroad company. The list was simply for the benefit of the Secretary, out of which he could select tracts of equal area to those which had been lost to the grant. Under this order, the Northern Pacific Railroad Company selected nearly every acre of vacant, unappropriated public land within the two indemnities of its road, and when required to rearrange its selections and specify its losses, it was found that the said company had placed in its selection list of 1883 75,000 acres more land than it
22 had lost, and this large amount of land it had to relinquish. In list No. 20, St. Cloud District, 2nd indemnity, 34,080.87 acres were relinquished; list No. 18, St. Cloud District, 681.60 acres; list No. 11, Fergus Falls District 3460.11; list No. 10, Fergus Falls District, 120 acres, being a total of 46,343.57 acres within the immediate vicinity of the

land claimed to be lost in this case, all of which had been selected under the order of May 28, 1883, and were relinquished on account of excess of land selected over land lost. Aside from this, in lists No. 14 and 15, Duluth Land District there were 24,307.98 acres relinquished for the same reason, making a total of 70,651 acres nearer the lands lost than the land selected in this case.

Aside from this, an examination of the records will show that some of the selection lists covering lands west of the land in controversy, and as a consequence nearer to the lost land than the land here selected, were filed at a later date than list No. 15, Duluth Land District, in which the land in controversy is found, to-wit:

List No. 13, filed Oct. 30, 1883, in the Crookston Land District. The number of acres in such list was 7,529.13. This list was filed three days after list No. 15. List No. 16 Crookston Land District, filed Dec. 12, 1883, embracing 480 acres. List No. 22, St. Cloud District, filed Nov. 7, 1883, embraced 823 acres. List No. 15, St. Cloud District, filed Oct. 17, 1883, and embraced 137,278.92 acres, out of which the company relinquished, April 29, 1893, 34,080.87 acres. List No. 14, Duluth Land District, filed Oct. 17, 1883, in which was
23 selected 22,433.89, from which amount 13,619.83 acres had to be relinquished. List No. 16, Duluth District, filed November 9, 1883, in which was selected 4,199.02 acres. These lands were vacant 23 days after the filing of list No. 15 and all of the above mentioned lands were nearer the lands lost than the selection in this case. These facts appear in the records and files of the Commissioner of the General Land Office, to which plaintiff begs leave to refer.

VIII.

And the plaintiff further says, that by the 3rd section of the granting act, the Northern Pacific Railroad Company was to receive—

"Every alternate section of public land (not mineral) designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through a state."

Congress did not intend to grant to the Northern Pacific Railroad Company twenty alternate sections of land per mile when the road passed through a state; but the intention was to grant ten alternate sections per mile on each side of said rail-

road line. The plaintiff avers, and charges the fact to be, that said company had exceeded the amount of land granted to it on the side of the railroad that the land in controversy is situated, long before the patent for this land was issued to the Northern Pacific Railway Company.

24 IX.

The plaintiff further says, that by the act of Congress of July 2, 1864, the Northern Pacific Railroad Company was authorized and empowered to lay out, locate, construct and furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly to some point on Puget Sound. The question came before the Secretary of the Interior as to what point on Lake Superior the eastern terminus of said railroad should be fixed, and by a decision of the Department of November 13, 1895, it was declared that the eastern terminus of said road was no farther east than Superior; subsequently, and on the 27th day of August, 1896, the Secretary of the Interior rendered a decision wherein he held that the eastern terminus or the initial point on Lake Superior of the Northern Pacific Railroad grant, by act of July 2, 1864, to be at Duluth, in accordance with which, on December 24, 1896, the land office prepared a diagram showing the eastern terminus of said grant, a copy of which was transmitted to the Duluth land office, on January 22, 1897.

On July 17, 1897, the Commissioner of the General Land Office addressed a communication to the Register and Receiver of the Duluth land office, of which the following is a copy:

"Department of the Interior,
General Land Office.

"Washington, D. C. July 17, 1897.

"Register and Receiver,
"Duluth, Minn.

25 "Sirs: On August 27, 1896, (23 L. D., 204), the Secretary of the Interior rendered a decision wherein he held that the initial point on Lake Superior or the eastern terminus of the grant to the Northern Pacific Railroad Company, was at Duluth, Minnesota, and on December 24, 1896, he approved a diagram prepared by this office showing the eastern terminus of the grant.

"On January 22, 1897, a copy of so much of said diagram as related to affected lands within your district, was transmitted to you for the use and guidance of your office.

"The decision of the Secretary aforesaid, had the effect of restoring to the public domain all lands lying east of said terminal, which had theretofore been withdrawn on account of the grant to said railroad company. Therefore, to the end that all persons interested may have opportunity to present any claim they may have to any of these lands, you will cause to be published for the period of thirty days, in some newspaper of general circulation in their vicinity, a notice referring to said Secretary's decision, which in effect declared that all lands previously withdrawn on account of the grant to the Northern Pacific Railroad Company, and lying east of the terminal established at Duluth, are restored to the public domain, and and all subject to disposal at your office. It should be specifically stated in said notice that all persons claiming rights under provisions of the act of March 3, 1887 (24 Stat., 556) through purchase from the railroad company should come for-
26 ward and assert their claims at the earliest possible date, in order to avoid conflicts which will necessarily arise through entries made under the general laws, your office having no information as to the tracts likely to be claimed under said act."

And the plaintiff further says, that the notice required to be given by the local officers, referred to in the above communication to them from the Commissioner of the General Land Office, was given. No claim of any kind was presented to the local office either by the Northern Pacific Railroad Company or any other person or persons: No protest of any kind, by any company or individual, was offered against the right, either of the government to dispose of this land or the applicant to acquire title thereto. These lands were restored to the public domain by direction of the Secretary and remain public lands up to July 12th, 1900, when the Commissioner reinstated the selection list by an order of that date directed to the Register and Receiver, which appears the following:

"The cancellation, therefore, of the company's selections above referred to, was erroneous, and is hereby rescinded and the selections restored to the records, which fact you will please note on your records. The selections will now be duly considered upon their legality otherwise, and in connection with any conflicting claims."

The plaintiff further says, that the reinstatement of the former selections could in no way effect the rights of Campbell to this land, whether the original cancelation of the
27 selections list was the result of an error of the Land Department either in law or in fact, the land remained, until the selection was approved by the Secretary, public land at the disposal of the Government. And if, when the

application for this land, now under consideration, was made it was public land, it must have been free and clear and free from any prior claims.

The plaintiff further says that on the 28th day of February, 1896 (26 L. D., 265), an order was made with reference to the lands within the grant of the Northern Pacific Railroad Company lying east of the terminal as established at Duluth, in which the following appears:

"As a matter of proper administration, and of due reguard to the settlers and others attempting to require these lands, and as a matter of due regard to the possible rights of the railroad company, it is directed that the odd-number sections available to the company's grant within the primary limit, and those selected within the indemnity limits formerly recognized, to the east of the terminus established by the departmental ruling in question be suspended from entry pending the judicial determination of the courts of the question in controversy. While entry of these lands will not be allowed during this suspension, yet in all cases where entries have been heretofore allowed, the parties will be permitted to complete the same by making proof thereon, but the issue of patent will be suspended until such judicial determination."

28

X.

The plaintiff further says, that under the provisions of the act of Congress of July 1, 1898, he is fully protected in his claim to the land in controversy. The construction of the act by the Secretary, as shown in Exhibit "D" attached to this complaint, if correct, would destroy the rights of the plaintiff to this land. It is for the purpose of obtaining a judicial construction of this act that this action is brought. In applying the provisions of the act to the claim presented, the only contention in this controversy, so far as the act is concerned, is as to the construction that should be given to claims arising under the Timber and Stone law where the application is tendered prior to January 1, 1898, but for causes arising not under the control of the applicant, entry is not completed by payment.

The Department's construction of the act is, that a claimant to be entitled to its provisions must either be a settler on the tract or a purchaser of the land prior to January 1, 1898. The plaintiff contends that the act of July 1, 1898, was intended to have a wider scope.

The act in specific terms embraces all qualified persons who had, prior to January 1, 1898, initiated a claim to the land in

good faith under color of title, or claim of right, under any law of the United States, or any ruling of the Department; whether the claimant be a settler, or an entrymen, or a purchaser, or whether he had completed his entry by payment prior to January 1, 1898, or whether his claim rests on a simple application made prior to January 1, 1898.

29 The plaintiff further shows, that subsequent to the date of the act, and on February 14, 1899, the Department issued a circular regulating the adjustment under the act (28 L. D., 103). In Paragraph 1, Subdivision "A" under the head of "Who Are the Beneficiaries Under the Act," appears the following:

"Par. 1. The act designates a class of beneficiaries whose status is that of claimants adverse to the Northern Pacific Railroad Company, or its successor in interest and in doing so, different words and terms of description are used in different portions of the act, but considering the act in its [entirely] and giving due recognition to each provision therein, this class embraces any qualified person who prior to January 1, 1898, by settlement, initiated, in good faith, a claim to lands of the description given, under color of title or claim of right, under any law of the United States, or any ruling of the Interior Department, and who is still maintaining such claim conformably to such law or ruling."

Subdivision "C" designates what claim to this class of lands comes within the provisions of this act:

"Par. 8. An individual claim adverse to the railroad claim is one which, prior to January 1, 1898, was initiated in good faith by some qualified person, by settlement, entry or purchase, 'under color of title or claim of right, under any law of the United States, or any ruling of the Interior Department,' and which is still maintained conformably to such law or ruling, and is one which, in the absence of the railroad
30 claim, could be perfected into full title."

The plaintiff further alleges, that he initiated his claim to said land in good faith; that by his application for the same he has a color of title and a claim of right to the same under the land laws of the United States; that such claim was initiated under the rulings of the Interior Department which restored this tract of land to the public domain and made it subject to disposal under the rules and regulations adopted for the sale of lands belonging to the United States; that the plaintiff is still maintaining his claim to said land conformably to such law and ruling. The plaintiff having only applied for said land, it may be that he has only a privilege to purchase

in the usual manner the land when offered for sale, in preference to all others. The land was open for sale when the plaintiff tendered his application. He had done all that he could do to perfect his right to the title of the United States. He applied to the register to purchase the land, but that officer refused to allow him to do so.

The law prescribes certain things to be done to entitle an applicant to purchase land under the act above mentioned; these things were done or would have been done, if the officers of the Government appointed to aid in their performance, had not failed in their duty. The plaintiff has a legal right in this case to be preferred when the sale is made, as against all others asserting a similar right under the law. The ground of the plaintiff's complaint is the action of the executive officers, and not against any act of Congress. The plain-
31 tiff's claim to this land may be adverse to that of the railroad company, but is such a claim as, in the absence of the railroad claim, would be perfected into full title.

XI.

The plaintiff further says, that by the circular of the Department dated February 14, 1899 (28 L. D., 105), Par. 2, referring to who is the lawful successor of the Northern Pacific Railroad, the department finds, upon examination, of a certified copy of the records in the foreclosure of a mortgage given by the Northern Pacific Railroad Company, that the Northern Pacific Railway Company is the lawful successor in interest as to all lands within the limits of the grant, excepting those situated within the State of Minnesota, and in the State of North Dakota, east of the Missouri River. As to all lands within these limits, the Northern Pacific Railroad Company had no successor.

On November 21, 1899 (29 L. D., 316), the departmental regulations of February 14, 1899, were so modified as to recognize the Northern Pacific Railway Company as the lawful successor in interest as to all lands within the limits of the grant to the Northern Pacific Railroad Company. This conclusion of the Department was based on the following:

"There have been filed in this department examined copies of special master and receiver's deed, dated September 22, 1899, conveying to the Northern Pacific Railway Company all the rights of the Northern Pacific Railroad Company in and to the lands east of the Missouri River, whether under the grant expressed in the Act of Congress of July 2,
32 1864, or under any subsequent grant, by way of indemnity or otherwise, subject, however, to a certain

mortgage or trust deed dated the first day of January, 1881, and known as the general first mortgage of said Northern Pacific Railroad Company, and executed by it to the Central Trust Company of New York, as trustees; also a certificate of satisfaction of said general first mortgage, said certificate having been duly executed by the Central Trust Company of New York on the 13th inst. In view of the showing above referred to, the circular of February 14, last, will be modified so as to recognize the Northern Pacific Railway Company, as the lawful successor in interest as to all the lands within the limits of the grant provided for in the acts making grants to the Northern Pacific Railroad Company."

The plaintiff further shows, that Congress has never recognize the Northern Pacific Railway Company as in any way the successor of the Northern Pacific Railroad Company, but by the act of July, 1, 1898, declared that—

"The legal question whether the said Northern Pacific Railway Company, is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act."

The plaintiff further says, that it is not in the power of the Secretary of the Interior nor the Attorney General of the United States ex parte to finally determine the question as to who is the successor, if any exist, to the Northern Pa-
33 cific Railroad Company; and the plaintiff says that there is no evidence showing that the Northern Pacific Railway Company is the successor of the Northern Pacific Railroad Company, and that fact is here denied.

XII.

The plaintiff further shows that under the provisions of Section 10 of the act of July 2, 1864, entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound, on the Pacific Coast by the Northern Route" it was enacted—

"That all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription; and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage or lien made in any way, except by the consent of the Congress of the United States."

The plaintiff further says that on the 31st day of May, 1870,

Congress passed a joint-resolution having reference to the Northern Pacific Railroad Company, in which appears the following:

"That the Northern Pacific Railroad Company, be and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal and mixed, including its franchise as a corporation."

34 The plaintiff says, that under this joint-resolution, only one mortgage could have been given; after this mortgage had been executed, the power conferred by said joint-resolution upon the Northern Pacific Railroad Company was exhausted, and any subsequent mortgage given by said company would be ineffectual as a lien upon its property.

XIII.

The plaintiff further shows that the claim of title by the defendants to said land is derived from the Northern Pacific Railway Company who derived title from a patent issued by the United States; but said patent was issued to the said Northern Pacific Railway Company under a mistake of law and without authority. It appears, however, that an action was brought in the Circuit Court of the United States for the Eastern District of Wisconsin by the Farmers' Loan & Trust Company, against the Northern Pacific Railroad Company, Philip B. Weston, George R. Seldon, William S. P. Prentice, William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Company, to foreclose a second mortgage given by said Northern Pacific Railroad Company to the complainant covering its property west of the Missouri River. Such proceedings were had therein that a decree of foreclosure was rendered, and the property supposed to be covered by said mortgage sold, and bid in by the Northern Pacific Railway Company. The lands east of the Missouri River supposed to belong to the Northern Pacific Railroad Company, were not covered by said mortgage. These lands by an order of the court dated
35 June 5, 1899, were ordered sold by a special master. The United States was not made a party to these proceedings. The petitioners for said order were the receivers of the Northern Pacific Railroad Company, and such proceedings were taken in said court that it was "ordered and decreed that the prayer of said petitioner be and the same is granted, and that all the lands granted by Congress in aid of the construction and equipment of the railroad of the defendant, the Northern Pacific Railroad Company and all the rights of said

defendant under the several land grants made to it by Congress, in any such lands lying within the State of Minnesota, and State of North Dakota, east of the Missouri River, shall be sold at public sale to the highest bidder, in the following manner:

"I. Such sale shall be made by Alfred L. Carey, Esq., hereby appointed special master for that purpose, who is hereby required to report his doings hereunder.

"II. All of said lands for which letters patent have issued to said defendant Northern Pacific Railroad Company, and the right to receive lands for which letters patent have not issued but which have been certified to said company, shall be sold in single sections, or sub-divisions thereof, and all lands for which patents have not issued, and which have not been selected by, and certify to said company, but to which said Northern Pacific Railroad Company is entitled under said grants of Congress, and all rights of said Northern Pacific Railroad Company to receive from the United States any lands which have not been certified or patented
36 to said railroad Company, whether under the grant expressed in the act of Congress of July 2, 1864, or any subsequent grant, together with all the right, title, interest and claim in or to said lands, and all its rights to receive from the United States patents therefor; and also all right, title, interest and equity in and to any other lands to which said Northern Pacific Railroad Company may be entitled, and which may have accrued or shall hereafter accrue to it under any of said land grants; and also right, title, equity and interest in and to any lands covered by or included in any of said land grants and not hereinbefore specified, shall be sold in one parcel as to such lands and rights in each county, at the following places," etc.

The lands in controversy being in St. Louis County, the order says:

"All of said lands and rights to lands within the County of St. Louis, in the State of Minnesota, shall be sold at the Court House of said County at Duluth."

The plaintiff contends that the court was without authority to make this sweeping order, that there was no mortgage covering the lands of the company lying east of the Missouri River, and the act of Congress of July 2, 1864, Section 10, expressly forbid creating a lien upon the real or personal property of said company, consequently no lien could be created upon said lands by any order of the court.

The plaintiff further shows that in pursuance of said order, and in compliance therewith, the special master named did

37 subsequently execute the same, and report that he did sell to the Northern Pacific Railway Company in consideration of the sum of $117,700.

"all of said lands within the County of St. Louis, in the State of Minnesota, for which patents had not issued, and which had not been selected by and certified to said Northern Pacific Railroad Company, but to which said railroad company was entitled under said grants of Congress, and all right of said railroad company to receive from the United States any lands within said county and state which had not been certified or patented to said railroad company, whether under the grant expressed in the act of Congress of July 2, 1864, or any subsequent grant by way of indemnity or otherwise, to said railroad company, together with all the right, title and interest and claim in or to any such lands and all its rights to receive from the United States patents therefor, and also all mineral and other reservations and exceptions of every nature and description contained in any conveyance or contract in respect of lands within said county and state at any time made by said railroad company or its receiver, or otherwise, and all rights, benefits, equity of redemption, title, interest or claim of said railroad company thereunder, and in and to all lands granted to it by the Congress of the United States within said county and state, and which might not be included in the sales under said decrees under the foregoing description of lands, for which letters patent had issued to said railroad company, and the right to receive lands for which

38 letters patent had not issued, but which had been selected by and certified to said company, whether or not such lands were then held by or had been theretofore sold or contracted to be sold, by said railroad company, or such receiver, or were claimed to have been sold under judicial proceedings, or for non-payment of taxes or for any cause soever, and whether or not the same stood in the name of said railroad company, it having been the intention to include every possible right, title and interest of said railroad company in and to any lands within said county and state covered by any grant to said railroad company by the Congress of the United States, and which might not be included in the sale under said decree under the foregoing description of lands for which letters patent had issued to said railroad company, and the right to receive lands for which letters patent had not issued, but which had been selected by and certified to said company, all subject, however, to a certain mortgage or trust deed, dated the first day of January, 1881, known as the General First Mortgage of said Northern Pacific Railroad Company, and executed by it to the Central

Trust Company of New York as trustees, were offered and sold as one parcel, and were struck off to the Northern Pacific Railway Company."

This plaintiff further shows that on the 22nd day of September, 1899, Alfred L. Cary, as special master, by deed of even date, attempted to convey to the Northern Pacific Railway Company the real and personal property reported by him to have been sold as above stated. In this conveyance no lands were described by legal subdivision or
39 otherwise. There appears in the deed the following recital:

"And whereas, at such sale all of said lands within the County of St. Louis, in the State of Minnesota, for which patents had not issued, and which had not been selected by and certified to said Northern Pacific Railroad Company, but to which said railroad company was entitled under said grant of Congress, and all rights of said railroad company to receive from the United States any lands within said county and state which had not been certified or patented to said railroad company, whether under the grant expressed in the act of Congress of July 2, 1864, or under any subsequent grant by way of indemnity or otherwise, to said railroad company together with all the right, title, interest and claim in or to any such lands and all its rights to receive from the United States patents therefor, and also all mineral and other reservations and exceptions of every nature and description contained in any conveyance or contract in respect to lands within said county and state at any time made by said railroad company or its receiver or otherwise, and all rights, benefits, equity of redemption, title interest or claim of said railroad company thereunder, and in and to all lands granted to it by the Congress of the United States within said county and state, and which might not be included in the sales under said decrees under the foregoing description of lands for which letters patent had issued to said railroad company, and the right to receive lands for which letters patent had not issued,
40 but which had been selected by and certified to said company, whether or not such lands were then held by or had theretofore been sold or contracted to be sold by said railroad company or such receivers, or were claimed to have been sold by said company or such receivers, or were claimed to have been sold under judicial proceedings, or non-payment of taxes or for any cause soever, and whether or not the same stood in the name of said railroad company, it having been the intention to include every possible right, title and interest of said railroad company in and to any of the lands within said county and state covered by any grant to said rail-

road company by the Congress of the United States, and which might not be included in the sale under the said decree under the foregoing description of lands for which letters patent had issued to said railroad company and the right to receive lands for which letters patent had not issued, but which had been selected by, and certified to, said railroad company—all subject, however, to a certain mortgage or deed of trust dated the first day of January, 1881, known as the General First Mortgage of said Northern Pacific Railroad Company, and executed by it to the Central Trust Company of New York, as trustees, were offered and sold in one parcel and were struck off to the Northern Pacific Railway Company."

And this plaintiff further shows, that at the time of the sale above referred to, the Northern Pacific Railroad Company had no interest visible or invisible upon which the
41 same could attach. The land in controversy was located within the second indemnity of its grant, and its selections had been canceled and the land restored to the public domain; and no title to this land was in the Northern Pacific Railroad Company, until the selection had been made, and the selection approved by the Secretary of the Interior, such sale conveyed no title to the land in controversy.

XIV.

And this plaintiff further shows that the Northern Pacific Railway Co., the pretended purchaser of this land under the order of the court heretofore mentioned, at the sale of the property of the Northern Pacific Railroad Company by the Special Master as heretofore recited, had no power or authority under its charter to purchase the same; that the patent issued by the United States to the Northern Pacific Railway Company for this land, was issued without authority under a mistake of law and fact. The Northern Pacific Railway Company is but the successor of the Superior & St. Croix Railroad Company, which was incorporated under the laws of the State of Wisconsin, and the Northern Pacific Railway Company succeeded to all the rights that the said Superior & St. Croix Railroad Company possessed, but to no other or greater rights. That prior to the amendments to this original charter of the Superior & St. Croix Railroad Company by the Legislature of the State of Wisconsin, approved April 15, 1895, said company was not authorized to hold or possess lands other than such as might be necessary for it to operate said road. By
42 the amendment to Article 4 of the Constitution of Wisconsin, Sec. 31, ratified November, 1871, the Legislature was prohibited from enacting any special or private laws granting corporate powers or privileges except to cities,

and plaintiff contends that under the 7th subdivision of Sec. 31, the amendments to the charter incorporating the Superior & St. Croix Railroad Company, adopted by the Legislature on April 15, 1895, are void.

A copy of the act to incorporate the Superior & St. Croix Railroad Company, and the acts amendatory thereof and supplemental thereto, and the proceedings taken to change the incorporate name of the Superior & St. Croix Railroad Company, is hereunto attached, marked Exhibit "E," and made a part of the plaintiff's complaint.

XV.

In consideration whereof, and for as much as this plaintiff is remediless in the premises by the strict rules of the common law, and relievable only in a court of equity, where matters of this nature are properly cognizable; to the end, therefore, that the said defendants Frederick Weyerhaeuser and John A. Humbird may respectfully, full true, direct and perfect answers make, in accordance with the best of their respective knowledge, information and belief to all and singular the matters, and charges, aforesaid, as fully in every respect as if the same were here again repeated and they thereunto particularly interrogated; and more especially that they may respectively set forth and discover by what particular title or claim they hold, or pretend to hold said land; and that they may
43 be compelled to surrender up the patent issued by the United States to the Northern Pacific Railway Company for said land; and that the said patent may be declared null and void, and the record cleared, in order that the said plaintiff may proceed to final proof in the usual manner in such cases; or that all title, right and interest which the defendants hold in and to said land, be divested, and pass to the plaintiff.

Wherefore, this plaintiff prays that this Honorable Court by its decree, will adjudge and decree that the patent issued by the United States to the Northern Pacific Railway Company was so issued under a mistake of law, and that said patent be delivered up and canceled; and that the plaintiff may proceed to final proof for the land here in controversy; and that all persons claiming or to claim by or under the defendants be forever barred and enjoined from claiming any title, right or interest in said land adverse to this plaintiff; and for such other relief as may be equitable and just.

And this plaintiff further says, that the above described land is principally valuable for the timber thereon, and unless the defendants are restrained by an order of this court, they will cause said timber to be cut and removed, and therefore this

plaintiff prays that the defendants may be perpetually enjoined from cutting or removing from the land any timber standing or lying thereon, and that they may be similarly restrained during the pendency of this action, from cutting or removing said timber from said land.

May it please this court to grant unto this plaintiff the writ of injunction, enjoining and restraining the defend-
44 ants during the pendency of this cause, from selling or disposing of, or removing any timber cut, or caused to be cut by them, or by any person under their direction, from the aforesaid premises, and from cutting or removing or selling or disposing of any timber now standing, or lying, upon the said premises or from cutting, or attempting to create any change upon the same, or any of said timber standing or lying thereon, or cut therefrom.

H. H. HOYT,
Solicitor and Counsel for Plaintiff,
310 Manhattan Building, Duluth, Minn.

State of Minnesota,
County of St. Louis—ss.

On this 14" day of November, A. D. 1905, before me personally appeared Charles D. Campbell, the plaintiff herein, and, made oath that he has read the above bill subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge except as to matters which are therein stated to be on his information and belief, and as to those matters he believes it to be true.
[Seal]

SOPHIA J. HOYT,
Notary Public, St. Louis Co., Minn.

Exhibit "A."

Timber and Stone Lands—Sworn Statement.

To be Made in Duplicate.

45 Land Office at Duluth, Minn., Oct. 26, 1895.

I, Charles D. Campbell, of Duluth, County of St. Louis, State of Minnesota, desiring to avail myself of the act of Congress of August 4, 1892, extending to all public land states the provisions of the act of June 30, 1878, relating to the sale of timber and stone lands, and with the view to purchase of the South East 1/4 of Section 21, Township 54 N. of Range 12 W. 4th Principal Meridian, in the district of land subject to sale at Duluth, Minn., do solemnly swear that I am a naturalized citizen of the United States, of the age of 34 years, and by occupation a liquor dealer; that I have personally examined said land, and from my personal knowledge state that said

land is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper or coal; that I have made no other application under said acts; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, or in any way or manner, with any person or persons whatsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself, and that my post-office address is 403 East 3rd St., Duluth, Minn.

(Signed) CHARLES D. CAMPBELL.

46 I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by W. H. Smallwood), and that I verily believe him to be the person he represents himself to be; and that this affidavit was subscribed and sworn to before me this 26th day of October, 1895.

A. J. TAYLOR, Register.

Fees tendered.

Exhibit "B."

Timber and Stone Lands—Sworn Statement.

To be made in duplicate.

Land Office at Duluth, Minn., Nov. 9, 1896.

I, Charles D. Campbell, of Duluth, County of St. Louis, State of Minnesota, desiring to avail myself of the provisions of the act of Congress of June 3, 1878, entitled, "An act for the sale of timber lands in the State of California, Oregon, Nevada, and in Washington Territory," as extended to all the Public land States by act of August 4, 1892, for the purchase of the South East ¼ of Section 21, Township 54 N. or Range 12 W. in the district of lands subject to sale at Duluth, Minn., do solemnly swear that I am a naturalized citizen of the United States of the age of 37 years, and by occupation Liquor Dealer. That I have personally examined said land, and from my personal knowledge state that said land is unfit for cul-

47 tivation, and valuable chiefly for its timber, that it is uninhabited, that it contains no mining or other improvements of any bona fide settlers, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper or coal; that I have made no other application under said acts; that I do not apply to purchase the land above described on specula-

tion, but in good faith to appropriate it to my own use and benefit, and that I have not, directly or indirectly, made any agreement or contract or in any way or manner, with any person or persons whatsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself; and that my post office address is 403 East 3rd St., Duluth, Minn., and this affidavit is made and offered as a renewal of my former application.

CHARLES D. CAMPBELL.

I, hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by W. H. Smallwood), and that I verily believe him to be the person he represents himself to be, and that this affidavit was subscribed and sworn to before me this 9th day of November, 1896.

F. L. RYAN, Receiver.

Fees tendered.

Exhibit "C."

Timber and Stone Lands—Sworn Statement.

To be made in duplicate.

48 Land Office at Duluth, Minn., Dec. 28, 1897.

I, Charles D. Campbell, of Duluth, County of St. Louis, State of Minn., desiring to avail myself of the provisions of the act of Congress of June 3, 1878, entitled "An Act for the Sale of Timber Lands in the State of California, Oregon, Nevada, and in Washington Territory," as extended to all the public land states by act of August 4, 1892, for the purchase of the South East ¼ of Section 21, Township 54 N. R. 12 W., in the District of lands subject to sale at Duluth, Minnesota, do solemnly swear that I am a naturalized citizen of the United States of the age of 35 years, and by occupation a Retail Liquor Dealer; that I have personally examined said land, and from my personal knowledge state that said land is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvement of any bona fide settler, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper or coal; that I have made no other application under said acts, except as stated below; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not directly or indirectly, made any agreement or contract, or in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States

may inure in whole or in part, to the benefit of any person except myself; and that my post office address is 205 West Superior St., Duluth, Minn., and that this is a renewal of my former application for the same land.

CHARLES D. CAMPBELL.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by W. H. Smallwood); and that I verily believe him to be the person he represents himself to be; and that this affidavit was subscribd and sworn to before me this 28th day of December, 1897.

WILLIAM E. CULKIN, Register.

49 F. L. C. Exhibit D. G. B. G.

August 30, 1905.

Richard B. Jones,

vs.

Northern Pacific Railroad Co.

The Commissioner of the General Land Office:

This is an appeal of Richard B. Jones from your office decision of December 2, 1901, holding for cancellation his cash entry allowed under act of June 3, 1878 (20 Stat. 89), as amended by the act of August 4, 1892 (27 Stat. 348), for the SW¼ of the SE¼ of Section 7, Township 54 N., R. 14 W., Duluth Land District.

The land in controversy lies within the second indemnity limits of the grant made in aid of the construction of the Northern Pacific Railroad, east of the City of Duluth, provision for which is found in the Joint-Resolution of May 31, 1870 (16 Stat. at 373), and was selected by the Northern Pacific Railroad Co. Oct. 17, 1883. This selection remained of record until March 22, 1897, when it was cancelled pursuant to departmental decision in the case of the Northern Pacific Railroad Co. (23 L. D. 204), holding Duluth to be the eastern terminus of the company's grant, but was reinstated by your office letter of May 26, 1900, under the decision of the Su-

50 preme Court of the United States in the case of Doherty v. Northern Pacific Railway Company (177 U. S. 421), holding the eastern terminus of the grant to be at Ashland, Wisconsin. Between the date of cancellation of the selection and before it had been reinstated, to-wit on December 17, 1897, the said Richard B. Jones applied to purchase the tract under the timber and stone acts, supra, and after due publication and proof made entry thereof, December 10, 1898. At the date of the purchase, but not at the date of the applica-

tion, the tract in controversy, with others, was withdrawn from entry by virtue of departmental order of February 28, 1898 (26 L. D., 265), but there was a provision in the order permitting the completion of all entries theretofore allowed.

It is contended upon the appeal, in substance:

1. That the Northern Pacific Railway Company has no legal or equitable claim upon the United States to be considered the successor in interest to the land-grant rights of the Northern Pacific Railroad Company, and that there is therefore no authority of law for the patenting of lands to the named company.

2. That the company's selection was and is void because no valid basis is assigned.

3. That the selection is irregular and void, because the selected land was not at date of selection the nearest available public land to the section alleged to have been lost in
51 place.

4. That the timber and stone application of Jones, having been presented at a time when the tract in controversy was unappropriated public domain, his application was the equivalent of an entry, and that he thereafter, in accordance with the terms of the order of suspension of February 28, 1898, supra had the right to complete the same by making proof and payment thereon.

5. That such application having been presented, and such proof and payment having been made, he had prior to January 1, 1898, in contemplation of law and within the meaning of the act of July 1, 1898 (30 Stat., 597, 620), purchased the land directly from the United States, that he had an entry prior to January 1, 1898, within the meaning of departmental instructions of February 14, 1899 (29 L. D., 103), and that therefore he is entitled to an adjustment of his claim under said act.

The question of the successorship of the Northern Pacific Railway Company to the land-grant rights of the Northern Pacific Railroad Company was considered by Attorney-General Harmon, February 6, 1897 (21 Opinions, 486), and referring to certain mortgage foreclosure proceedings this department was then advised that it should act upon applications for patents by the railway company upon the same considerations which should govern it in case there had been no foreclosure
52 and the applications had been made by the old company.

It was but recently urged before this Department that said

opinion was ill-advised and unsound, both in law and fact. The matter was again submitted to the Attorney-General, and April 12, 1905, Attorney-General Moody considered the question, concluding as follows:

"It seems to me that the decision of my predecessor was correct, and accordingly have to advise you, the Secretary of the Interior, that, in my opinion, you should continue to be governed by the rule there laid down."

This question is not therefore open for further consideration by this Department. Hugh P. Ferguson v. Northern Pacific Railway Company (33 L. D., —).

Appellant's second contention that the company's selection herein is void because of invalid basis, rests upon the allegation that the basis assigned lies within the overlapping limits of the grant to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior, made by the acts of May 5, 1864 (13 Stat. 64), and July 13, 1866 (14 Stat. 93), afterwards conferred by the State upon the Lake Superior and Mississippi Railroad Company, and the grant to the Northern Pacific Railroad Company, made by the act of July 2, 1864 (13 Stat. 365); that Congress did not make a double
53 grant within these overlapping limits, and that the date of the grant to the Lake Superior and Mississippi Railroad Company being prior to the grant to the Northern Pacific Railroad Company's road opposite the tract, and the tract having been approved to the former company prior to the definite location of the last named company's road, it was not granted to it, and therefore not lost to that company's grant.

This contention is unsound. This base land is not within the limits of the withdrawal of May 26, 1864, made on account of the grant of May, 5, 1864, and the case does not therefore fall within the ruling of the Department in the case of Northern Pacific Railroad Co. v. Rooney (30 L. D., 403). It is true the base land was certified under the grant of May 5, 1864, but it was because of the fact that it fell within the indemnity limits of that grant as adjusted to the line of definite location, and was selected after the date of the Northern Pacific land grant, but prior to the definite location of that line of road. No question arises therefore in this case of the right of the Northern Pacific Company to satisfy its loss from its second indemnity-belt where the base land was in law and fact lost prior to the grant of July 2, 1864. In the case of Northern Pacific Railroad Company (23 L. D., 264), it was held that because of a proviso in the act of July 2, 1864, supra, said company

would not be entitled to receive indemnity for any of
54 the losses sustained on account of the grant to the Lake Superior and Mississippi Railroad Company, made by the act of May 5, 1864, between Thomson's Junction and Duluth. This decision was fundamentally wrong. It held that, because of an agreement, amounting to a consolidation between the two companies, whereby the Northern Pacific Company was authorized to use the other company's tracks between Thomson's Junction and Duluth, it thereby adopted this as its line of road between these points, that Duluth being on Lake Superior, the eastern point named in the company's charter, that point was therefore the eastern terminus of its grant, and that it therefore between these points being "upon the line of another railroad route to aid in the construction of which lands" had been theretofore granted by the United States, was, because of the proviso above referred to, not entitled to indemnity for lands lost because of the prior grant. This view was declared erroneous by the Supreme Court of the United States in Doherty case, supra, which recognized the extension of the road eastward from Thomson's Junction to Ashland, Wisconsin, as part of the land grant road, and it follows that, as the route of the Northern Pacific Railroad is in no sense upon the same general line as that of the Lake Superior and Mississippi Railroad, the proviso in question is without application, and the contention that the Northern Pacific Company is not entitled to indemnity for this tract must fail.

55 With regard to the regularity of the indemnity selection of this land there can be no question but that, as originally presented, it was a proper selection under existing departmental regulations, the company at that time being relieved from the specification of a basis for its selections. It is claimed, however, that this selection should not receive departmental approval because there are, or were, at the time said selection was perfected by the assigning of a basis in 1893, available lands nearer to the loss then specified, and the question is therefore presented, whether, admitting the same to be true, the selection is a proper one under the terms of the granting act.

The third, or granting, section of the act of July 2, 1864, supra, grants to the Northern Pacific Railroad Company—

"Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said

railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, and
56 and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the directions of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

December 7, 1887, the question as to whether selections could be made within the first indemnity belt of the Northern Pacific land-grant for losses outside of the particular State or Territory in which the same occurred, was submitted to the Attorney-General for opinion, and in consideration thereof, Mr. Attorney-General Garland, in his opinion dated January 17, 1888 (8 L. D., 14, 17), after referring to the clause of the section above quoted providing for indemnity, says:

"The conditions of this indemnity, set forth in detail, under which the right or privileges of selection rests in the company are, lands shall have been lost out of the amount granted; selections must be made by the company of other lands in lieu of them; those selections must be made under the directions of the Secretary of the Interior; selections shall only be of alternate odd-numbered sections, and they must not be more than ten miles beyond the limits of the granted sections.
57 These are all the limitations or conditions provided for by the act of 1864, subject to which the right to select is granted. Interpretation will not warrant the adding of another limitation that the lieu lands must be selected in the same State or Territory in which the lands were lost. To annex such an additional limitation to the words of the grant would be legislation and not construction."

It is further provided by said Section 3, of the act of 1864:

"That all mineral lands be, and the same are, hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated lands, in odd numbered sections nearest to the line of said road may be selected as above provided."

It will be noted that this provision limits the selection of

indemnity, for losses to the grant on account of mineral lands, to "odd-numbered sections, nearest to the line of said road," etc.

There could be no good reason for attaching an additional condition upon selections made in lieu lands lost to the grant because mineral in character, and it might therefore be urged that it was intended to enlarge the limits within which such selections could be made. Thus, for general indemnity, selections were to be made from "alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections," being the granted sections,
58 and for losses on account of mineral lands, to "odd-numbered sections nearest to the line of said road."

Be this as it may, the lands made the basis for the selection in question were not lost to the grant because mineral in character, and the limitation "nearest to the line of said road," differs widely from a requirement that the selection must be nearest the tract lost and made the basis for the selection.

In the case of United States v. Colton Marble and Lime Company (146 U. S., 615, 618), it was said by the court:

"It might well be assumed, that very likely the Atlantic and Pacific Company would be called upon to select from the indemnity lands a portion sufficient to make good the deficiency, in the granted limits. That right of selection was a prospective right, and if it was to be fully exercised, no adverse title could be created to any lands within the indemnity limits. Suppose, for instance, it should turn out that only half of the indemnity lands were necessary to make good the deficiency, and that one-half of such lands were well watered and valuable, while the remainder were arid and comparatively valueless, obviously the right of selection would be seriously impaired if it were limited to only the arid and valueless tracts."

In that case the court had under consideration the
59 prospective right of the Atlantic and Pacific Railroad Company to odd-numbered sections within the indemnity limits of its grant, made by act of July 27, 1866 (14 Stat., 292), which grant has the same indemnity provisions as the Northern Pacific act of 1864, with the exception that indemnity for losses to the grant on acount of mineral lands is limited to "odd-numbered sections nearest to the line of said road and within twenty miles thereof." With regard to this latter provision it will be noticed that the selection is limited to odd numbered sections within the pri-

mary limits of the grant, as those limits are twenty miles on each side of the road in Territories, thus, in effect, nullifying the provision, because the sections from which selections are to be made were specifically granted in place.

The resolution of May 31, 1870, supra, providing for a second indemnity belt to the Northern Pacific grant, before quoted from, merely limits the place of selection to a belt "ten miles on each side of said road, beyond the limits prescribed in said charter," etc.

The act of 1864 and the resolution of 1870 each therefore establish a limit beyond which the company can not go in making its general indemnity selections, but in neither is there any requirement limiting such selections to the lands nearest the sections in which the losses to the grant occur, and to so limit such selections would attach a condition or limitation upon the right of selection not found in the
60 granting acts.

That the right of selection conferred by these acts can not be restricted by the Secretary of the Interior seems clear. His duty in the premises is to supervise the administration of the grant, but this authority does not permit him to abridge or enlarge the laws of Congress. We should see that the selections made in satisfaction of the grant are confined to the lands described in the granting act, but as between different sections, equally within the description contained therein, he can not say which may or which may not be selected, for in so doing he would be denying the railroad company the right to make the selection. See Willamette Valley and Cascade Wagon Road Co., v. Bruner (26 L. D., 357).

Attention has been called to the Circular of August 4, 1885 (4 L. D., 90), relating to railroad indemnity selections and requiring a designation of a loss as a basis for all indemnity selections, in which circular it is said that:

"Where deficiencies exist, for which indemnity is allowed by law, the lieu selections must be made from vacant, unappropriated land within the proper sections and limits nearest the granted section in which the loss occurred."

This circular was issued before the opinion of the Attorney-General or the decision of the court referred to. Its main purpose was to require the specification of a loss as a basis for the selection, thereby aiding the adjustment of the
61 grant, for it required the designation of a loss as a basis for all selections previously approved and certified as well as for those then pending or therafter to be made.

In respect to the portion of the said circular above quoted, in the matter of proximity between loss and selected tract, in view of what has been said, it can not be considered as a limitation upon the right of selection, but rather as suggesting a manner of designating the losses so as to aid in adjusting the grant. It might also be stated that it is learned upon inquiry at your office, that, at least as to lands within the second indemnity belt, a strict adherence thereto has not been enforced.

In the case of William Hickey (26 L. D., 612), it was held (syllabus):

"Indemnity selections are made under the direction of the Secretary of the Interior, and the enforcement of any requirement in the matter of a specification of a loss is only for his information, and as a bar to the enlargement of the grant, and may be waived whenever he deems such course advisable."

The conclusions hereinbefore reached answer appellant's fourth contention. The railway company's selection was improperly canceled; the application of Jones initiated no right as against the company, and his purchase no claim which can be recognized by the land department, unless it is
62 protected by the provisions of the act of July 1, 1898, supra, and this question involves consideration of the fifth and last specification of error on appeal.

If Jones had purchased this land from the United States prior to January 1, 1898, or if he had prior to that time made an entry thereof within the meaning of the act of July 1, 1898, he is entitled to an adjustment thereunder. It is believed that he had done neither of these things. While the application to purchase was presented prior to the date named, proof and payment were not made until after that date. There was no purchase prior to January 1, 1898. But it is contended that the application of Jones was the equivalent of an entry. No vested right is acquired by a timber and stone application. While such application, if presented in accordance with the law and for land subject thereto, reserves the land from other disposition by the land department, no right is initiated as against the government, and prior to the submission and acceptance of final proof and the payment of the purchase price, the Secretary of the Interior may suspend the same from disposition and sale under the public land laws. Board of Control, Canal No. 3, State of Colorado v. Torrence (32 L. D. 472). This is precisely what was done in this case. The tract was withdrawn from entry by the order of February 28, 1898, and the purchase of Jones allowed in violation of that order initiated no right falling within the remedial provisions

37

of the act of July 1, 1898. F. W. Eaton and A. F.
63 Huntoon v. Northern Pacific Railway Company (33 L. D.—).

The decision appealed from is affirmed. The papers are herewith returned.

Very respectfully,

THOS. RYAN,
Acting Secretary.

64 Exhibit E.

To incorporate the Superior and St. Croix Railroad Company.

The People of the State of Wisconsin represented in Senate and Assembly do enact as follows:

Section 1. That I. W. Gates, R. G. Gates, E. W. Anderson, Jr., Hiram Hayes, S. H. Clough, Hiram Robbins, D. W. Maxon, John J. Talmadge, H. L. Palmer, S. B. Dresser, O. S. Powell and such other persons as may be associated with them who shall become stockholders in the association or corporation hereby created, in accordance with the provisions of this act, shall be and they are hereby created a body corporate and politic by the name and style of the Superior and St. Croix Railroad Company, and by that name shall have perpetual succession, be competent to contract and be contracted with, sue and be sued, implead and be empleaded, answer and be answered, defend and be defended in any court whatever. The said corporation may make, have and use a common seal, which it may alter or renew at pleasure; it shall be capable of acquiring by deed, lease or other conveyance, a fee simple or any less estate in lands, tenements or easements in the same, and of conveying any such estate or interest by deed, lease or other conveyance, or of holding such estate or in-
65 terest, or any other estate necessary for the use of said railroad, either real, personal or mixed, and shall have and enjoy all the privileges, franchises or immunities incident to a corporation, and may do and perform all and singular the acts and matters which to any corporation it shall lawfully appertain to do and perform for the well being of said corporation.

Section 2. The said company by this act created is hereby authorized and empowered to survey, locate, and from time to time alter, change and re-locate (so as to not materially to change the route) and to construct and complete, perpetually to have, use and enjoy, maintain and operate the said railroad with one or more tracks or lines, over and along the following routes, that is to say: beginning at some convenient

point on the west shore of the Bay of Superior or on the south shore of the Bay of St. Louis in the County of Douglas running thence southerly by route as direct as may be practicable through the counties of Douglas, Burnett, Polk, St. Croix, and Pierre via St. Croix Falls and Hudson to Prescott with a branch or extension running westerly from the above designated place of beginning in Douglas County to such point on the Minnesota boundary north of the Nemadji River as may be deemed desirable by the directors of said railroad company.

66 Section 3. The company hereby created shall have the perpetual right, power and authority to transport, take and carry property and persons upon said railroad by steam or other power and to receive and store away any property in any of its depots or other buildings, and to make, construct, maintain and use all such switches, turn outs, side tracks as it shall deem necessary, and also to houses, warehouses, car houses and shops, engine houses and all other buildings, fixtures and things for the accommodation of said company and its roads and those using the same. And said railroad company shall have power to connect its road with any other railroad and to operate the same or to run in connection with any such railroad in such a manner as may be agreed upon between the boards of directors of this company and any such railroad. And any railroad company or association having a railroad built or partly built running in the direction of the line of railroad which the railroad company hereby created is authorized to construct and operate and which this company by its act created shall agree to use or connect with is hereby authorized to make such lease or sale to this company or corporation perpetually or for a limited time of the whole or any part of their railroad so constructed or partly constructed, together with the rolling stock, machinery, buildings, tenements or fixtures, and all other property, real, personal or mixed, of the
67 said company or association, together with its franchises, rights, privileges and immunities, or to sell the same, and in consideration of such lease or sale to take or receive such rents or payments as may be agreed upon.

Section 4. The said company shall have the right, authority and power, and it is hereby authorized and empowered to construct its railroad along and upon a crop under or over any public or private highway, road or streets, plank road or railroad if the same shall be necessary, but the said company shall put such highway, road, street, plank road or railroad in such condition and state of repair as not to impair or interfere with the free and proper use and also to erect and maintain all necessary bridges for the use of their railroad over any stream

of water or water course at such points of crossing the same as said road may be located, with all necessary abutments, piers, arches and foundations.

Section 5. It shall be lawful for the company hereby created and it shall have the power and authority by its officers, engineers, agents, servants and workmen, to enter upon any land for the purpose of exploring, surveying, locating and determining the routes of said railroads and when said routes or any portion thereof shall be determined by resolution, adopted by its board of directors, it shall be lawful for said company, and it shall have the right, power and authority by its officers, engineers, agents, contractors, surveyors, servants and workmen, at any time, to enter upon, take possession, occupy and
68 use any land along and including the line of said route not exceeding one hundred feet in width. It shall also be lawful for said company and it shall have the right, power and authority, at any time, to enter upon, take, possess and occupy and use any other lands beyond said limits of one hundred feet which the directors shall, by resolution adopted by them (a copy of which shall be recorded at the expense of said company in the office of the register of deeds, in the county in which said lands are located), declare to be necessary for the use of said company for the purpose of erecting depot buildings, station houses, machine shops, freight houses, warehouses, engine houses or buildings or fixtures of any kind, or ground about the same, for the convenient operation of the road or for making drains or giving proper direction to water courses, or of directing or changing the channel of water courses, or for the purposes of removing such substances or things as may endanger, obstruct or interfere with the free use of said road, or for the purpose of depositing earth, gravel, stone, timber or other material for embankments, structures or superstructures necessary to the construction, repair or removal of said road. Said company shall, however, at such time and in such manner as is provided by, and in this chapter and act, be liable to pay the full value of all earth, gravel, stone, timber and land which may be so as aforesaid, taken, possessed, occupied and used for any of the purposes aforesaid,
69 which is the private property of either persons or corporations, which value (unless the owner thereof and said company shall agree as to the same), shall be ascertained and determined in the manner hereinafter provided; and whenever the same shall have been paid, tendered or deposited, as provided in this act, and estate in and to all and every such lands in fee simple, absolute forever, shall be and become vested in said company by virtue thereof, and of the provisions of this act, and by the same means a complete title shall vest in said company in and to all such earth, gravel, stone and timber

and whenever said company shall deem that such property or any part or portion of such property shall no longer be necessary for the purposes for which the same were taken, it is hereby [author-] to lease or sell the same or any part thereof.

Section 6. On the completion of said road, or any part thereof, it shall be lawful for said company, and it is hereby authorized and empowered, to demand and receive such sum or sums of money for the transportation of persons and of property and for the storage of property as it shall from time to time deem reasonable.

Section 7. Said company hereby created shall also have full power and authority to transport persons and property in boats, vessels, barges and other water craft on any of the navigable waters which its said railroad or roads run to or connect with, and to receive and collect reasonable compensation for the same and for that purpose may build or
70 purchase, own and use such boats, vessels, barges and other water craft as it may require.

Section 8. The company hereby created shall be capable in law of taking and holding any land granted to it by the government of the United States or of this state or by individuals or corporations to aid in the construction of its road and may also pledge, mortgage or otherwise dispose of all their rights, title and interest in and to said lands and in any other estate, real, personal or mixed, of which they may be seized at the time of the execution of such mortgage or which they may acquire subsequently thereto, in such manner and on such terms as the directors may think proper.

Section 9. All the affairs of said company shall be managed by a board of directors who shall be stockholders and who are hereby invested with all the powers of the corporation. They shall be chosen annually by ballot by the stockholders at the annual meeting of the company, which shall be held on such notice and at such time as shall be prescribed by the by-laws and at such place as shall be prescribed by the board of directors and stated in such notice. At all meetings of the stockholders every stockholder shall be entitled to one vote for each share of stock held by him or her and may vote in person or by proxy duly authorized, and no business shall be transacted at any meeting of the stockholders unless a majority of the stock subscribed is represented. In all elections of directors those stockholders equal to the number to be elected having
71 the greatest number of votes shall be deemed and declared duly elected. The elections shall be conducted in such manner as shall be prescribed by the by-laws of the company, and if from any cause an election of directors shall

not be had at the time when by the provisions of this act or of the by-laws, it should be had, the same may be held at any other time on notice to be given as aforesaid, and until such election be had, the directors of the preceding year shall continue to act and the corporation hereby created shall not forfeit or loose any of its privileges, franchises or immunities for a less period than ten consecutive years. The board may at any time increase or diminish the number of directors to be elected at the next annual meeting of the stockholders, and the number to be elected shall be specified in the notice of election, but shall never be less than five or more than eleven.

Section 10. A majority of the board of directors shall constitute a quorum for the transaction of any business. They shall meet at such times and places, and be convened in such manner at they shall decide upon. They shall elect one of their own number to be president and one to be vice president. The president shall, when present, preside at all meetings of the board and of the stockholders and when absent the vice-president shall discharge the duties of the president, and when both are absent the directors may appoint a president pro tem. The board of directors shall have power to appoint an ex-
72 ecutive committee and prescribe its powers and duties to appoint a secretary, treasurer and such engineers, superintendents, agents and other officers as they may deem necessary and remove them at pleasure, prescribe their duties and compensation, and may demand adequate security for the discharge of their respective duties and trusts.

Section 11. The persons named in the first section shall be the first directors and shall hold their offices until the first Wednesday of May, A. D. 1871, and until others are chosen in their places, and in case of vacancy in the directors, or by reason of the death or resignation of any director, or of his ceasing to be a stockholder, it may be filled by the remaining directors until the next annual election or until some other person shall be elected to fill the same. The directors herein named may appoint three persons, who shall be stockholders to be inspectors at the first election after which the stockholders shall choose three such inspectors at the annual elections. If no inspectors are chosen the directors may appoint three from time to time. If at any time an election of directors shall not take place on the day appointed by this act, the corporation shall not for that cause be dissolved, but an election may be held on another day in such manner as shall be prescribed by the directors or provided for by the by-laws.

Section 12. The said company shall have authority
73 and power and it is hereby authorized and empowered in its corporate capacity to borrow any sum of money

from any person or persons, corporation or body politic of any kind, and to make, execute and deliver all the necessary writings, notes, bonds, mortgages, or other papers and securities in amount and kind as may be deemed expedient by said corporation in consideration of any such loan or in the discharge of any liabilities that it may incur in the construction, repair, equipment or running of said road and the powers of said corporation for the purposes aforesaid and for all purposes necessary to carry out the objects of said company, viz: the construction of a railroad from and to the points aforesaid, are hereby ratified and confirmed and the contracts and official acts of said company declared binding in law and equity upon said corporation and upon all other parties to such contracts. Said company shall also have authority and power and it is hereby authorized and empowered in its corporate capacity to make, execute, issue and deliver its bonds and obligations from time to time and at any time in such an amount that all the bonds of said company outstanding at any one time will not exceed the amount of the capital stock of said company. The directors of said company are hereby authorized and empowered to prescribe by resolution to be by them adopted, the sum or sums for which each of said bonds shall be issued, the time or times and place or places when and where the principal and interest of the same shall be payable and
74 whether payable to order or to bearer or how otherwise negotiable, the rate of interest which such bonds shall bear and the manner and form in which the interst coupons annexed to them shall be executed; and to secure the payments of any or all of such bonds the said corporation is hereby authorized and empowered in its corporate capacity, to make, execute and deliver a mortgage or deed of trust upon the whole or any part of its railroad constructed or authorized to be constructed, and of any or all of its real estate, personal or mixed, in possession or expectancy owned and acquired, or to be thereafter owned and acquired by said corporation; and the said company is also hereby authorized and empowered in and by such mortgage or deed of trust to confer upon the trustees or mortgagees full and ample powers, to enter into and upon, and to take posession of, have, use, and enjoy or to sell and dispose of the whole or any part of said railroad or its estate, together with the functions appertaining to said railroad, and all corporate and other franchises, rights and privileges of said corporation; and the directors of said company are hereby authorized and empowered to prescribe by resolution adopted by them all matters relating to the form and terms of any such mortgage or deed of trust, and of its execution and delivery, and they are authorized to provide for the periodical payments

to such trustee or receiver as they shall appoint a certain sum to create a sinking fund with which to pay off or dis-
75 charge at or before maturity any or all of the bonds by them authorized to be issued; and also to provide the manner in which trustee or receiver shall pay out or dispose of said sinking fund, and to authorize him to designate by lot or in any other suitable manner, the bond or bonds to the payment of which such sinking fund or any part of it shall be applied and the said board of directors are hereby authorized and empowered to sell, pledge, hypothicate or otherwise dispose of, either for money, work or material, to be used in the construction and equipment of said railroad, all or any portion of such mortgage bonds, or other securities or bonds received from any county town, village or city at [part] or at such price less than par as the said directors may, by resolution to be by them adopted, deem advisable; any such mortgage or deed of trust and every discharge or satisfaction thereof may be recorded in the office of the secretary of state in a proper book kept for that purpose and the certificate of such recording endorsed on such mortgage or deed of trust shall have the same effect as if such mortgage or deed of trust was recorded in the several counties through which such road may run, and such record in the office of the secretary shall be sufficient notice to all persons.

Section 13. The company hereby created shall for all and every of the lands and property which shall appropriate, take, possess, occupy or use (unless the same being donated
76 to them pay the value thereof at the time thereof at the time and in the manner herein provided; and such value shall be ascertained, fixed and determined by mutual agreement between the said company and the owners of such land and property respectively, or by and through the medium and appraisement and determination or award of commissioners as hereinafter provided.

Section 14. When the said corporation shall not agree with the owner or owners of such required land for the purchase thereof or as to the compensation to be paid therefor, or when, by reason of the legal incapacity or of absence of such owner or owners, no such agreement can be made, then and in that case it shall be lawful for any judge of the supreme court or county courts of this state on application of the said company or the owner or owners of any such land and at the cost and charge of said company to appoint three disinterested persons residing in the county through which the said road runs whose duty it shall be to view and examine the lands so taken with the buildings and improvements, if any thereon, and to estimate the value of the lands so taken and required by said

company, and all the damages which the owner or owners thereof shall sustain or may have sustained by reason of the taking of the same for the construction and use of said road or works appertaining thereto. And it shall be the duty of said company or of the owner or owners aforesaid, as the
77 case may be, to give three weeks notice of their application to the judge of the supreme, circuit or county courts, for the appointment of said commissioners to be published for three successive weeks in a newspaper published (if there be any) in the county in which such land may be situated, and the affidavit of the printer or publisher shall be sufficient legal evidence of such publication; and the persons so appointed before entering upon the discharge of such duties shall take an oath before some justice of the peace or other person competent by law to administer oaths, faithfully and to the best of their ability to examine the lands so taken or required by said company and impartially to estimate and appraise the value of the same and the damage or injury which the owner or owners thereof shall have sustained or may sustain by reason of the taking and use thereof by said company, whereupon such commissioners shall proceed to examine the premises and estimate the value of such land and the amount of damage, and they, or a majority of them, shall make a report in writing of such valuation under their hands and seals to the circuit court of the county where the land lies, and shall return the same within ninety days after their appointment to the clerk of the circuit court of the county where they reside, and it shall be the duty of the said clerk to immediately file the same; and in case no appeal shall be made within thirty days after the filing of the said report as hereinafter provided then the said clerk shall record the same at the expense of
78 said company and judgment of the said court shall be entered thereon on motion of either party at any term of said court; provided, that either party may appeal to said court within thirty days after said report shall have been filed in the clerk's office and such appeal shall be tried in the same manner as other issues on trial in said court; and the jury empaneled to try the same shall find the value of the land so taken as required by said company and the damages which the owner or owners thereof shall have sustained by the taking of the same and the judgment of the said court shall be entered accordingly; provided, also, that it shall not be lawful for the said commissioners or said court to proceed in the assessment of damages or in the valuation of any land or materials as aforesaid in the absence of the owner or owners, his, her or their agents or attorneys unless it is shown to them by competent testimony that the said owner or owners shall have had at least five days notice of the time and place at which such

assessment or valuation was to be made or that the said owner or owners are absent from the State of Wisconsin and if the said owner or owners shall be minors or non compos mentes or absent from the state the service of notice may be made on the guardian or trustee, if there be any, or in such manner as the court may direct; provided, also, that upon the making and filing of the report as aforesaid and payment in legal tender of the amount of any valuation or appraisal specified
79 therein to the owner or owners of any such lands his, her or their legal representatives or payment thereof into the circuit court of the county in which such lands shall be situated for the owner or owners thereof the said company, their agents or the contractor for making or repairing said railroad, may immediately take and use the same without awaiting the issue of any appeal brought thereon; and, provided, also, that in case of an appeal as aforesaid, by the owner or owners of such land, the said company immediately on notice of the perfection of such appeal shall pay into court to abide the judgment therein the amount awarded by such commissioners, and in case of any appeal by the company it shall be the duty of such company to execute a bond with sufficient surety to be approved by the court, conditioned to pay any judgment that may be rendered therein and to abide by the order of the court in the premises; such bond shall be filed at the time of entering the appeal, and in case of neglect or refusal unless further time so to do shall have been granted by the court, the appeal may be dismissed on motion. Whenever any judgment shall have ben entered as herein provided for the value of any lands or for any damages for taking and using the same and the amount specified in such judgment shall have been paid or tendered to the owner or owners of such lands, his, her or their legal representatives, the said company shall be entitled to the estate and interest in the same as fully as if it had been conveyed in fee simple and if such valuation
80 be not received when tendered it may at any time thereafter be received or may be collected from said company by action at law at the cost and expense of the person or persons entitled to the same, provided that the costs of any proceedings and judgment specified in the last preceding section shall be taxed by the court and paid by such company except in cases when upon appeal the verdict of the jury shall be for the same or for a less sum than that reported by the commissioners.

Section 15. The capital stock of the company hereby created shall in the first instance be five millions of dollars, which capital stock may be increased to any sum not exceeding ten millions of dollars; the said capital stock to be divided into shares of one hundred dollars each.

Section 16. The several counties, towns, cities and villages upon or contiguous to the line of the said road, by this act authorized to be constructed as the same may be hereafter located and established, are and each of them is hereby authorized to aid in the construction of said railroad by subscribing to the stock of the company and paying for the same in money, and levying a special tax to raise money for that purpose, or by issuing bonds to said company in payment for said stock and levying taxes to pay the interest as it accrues upon said bonds, and to establish a sinking fund for the gradual redemption and ultimate full redemption of said bonds at maturity; and for these purposes the boards of super-
81 visors or officers of such counties or towns; the boards of trustees of such villages, and the common council of such cities respectively and severally shall have power to negotiate and arrange the terms and conditions upon which such aid shall be granted; to enter into all proper contracts with said company in relation to the same and to adopt such ordinances and regulations pertaining thereto or to the taxes to be levied under this act, as may be expedient and proper and consistent with law; provided, that before any such aid shall be granted or contracted for by any such county, town, village or city, the question of granting the same shall be submitted to a vote of the electors thereof respectively, as hereinafter provided.

Section 17. Whenever the president and secretary of the said Superior and St. Croix Railroad Company shall certify under their hands and the seal of the said company to the authorities of any such county, town, city or village, that the route of said railroad has been located through or contiguous to such county, town, village or city, it shall be the duty of the authorities thereof hereinbefore mentioned, to call a special election to determine the question whether aid shall be granted to said company in the manner prescribed in the preceding section of this act, such election shall be called, notice thereof shall be given, the form of ballots shall be prescribed and all regulations relating to the same be determined by the proper authorities hereinbefore mentioned, of such
82 counties, towns, villages and cities so that the question be fairly submitted to a vote of the electors. In case at any such election the majority of votes shall be against granting such aid the proper authorities may afterward in their discretion call another election upon the same subject and the same shall be conducted in a like manner.

Section 18. If at any election authorized by this act any such county, town, village or city shall vote in favor of grant-

ing such aid by a majority of the votes cast at such election then the authorities thereof shall have and exercise in their discretion the powers conferred upon them by the preceding sections of this act and all the contracts made by them by virtue thereof shall be valid and enforcible according to the true intent and meaning thereof.

Section 19. The several counties, towns, villages and cities which shall subscribe for the stock of said company as authorized by this act, are hereby authorized severally to own, control and dispose of the same in the same manner as an individual might do, and to vote upon the same by agents, duly authorized, at an election held by the stockholders of the said company.

Section 20. All property which the company hereby created is authorized to appropriate, take, possess, hold or use by making payment therefor, is hereby declared to be taken for public use as soon as the company shall so appropriate, take, possess, hold or use the same.

83 Section 21. It is hereby declared that in the judgment of the legislature of this state the objects of the corporation hereby created, cannot be attained under the general laws.

Section 22. This act is hereby declared to be a public act and the same immediately after the passage thereof shall be printed by the state printer and be in full force and effect from and after its passage.

J. M. BINGHAM,
Speaker of the Assembly.

THAD. C. POUND,
President of the Senate.

Approved March 15, 1870.

LUCIUS FAIRCHILD, Governor.

An Act.

To amend Chapter 326 of the private and local laws of 1870, entitled "An act to incorporate the Superior and St. Croix Railroad Company."

The People of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

Section 1. Section one of Chapter 326 of the private and local laws of 1870, is hereby amended so as to read as follows: "F. W. Gates, R. G. Coburn, E. W. Anderson, Jr., Hiram Hayes, S. H. Clough, Hiram Robbins, D. W. Maxon, John J.

Talmadge, H. L. Palmer, S. B. Dresser, O. S. Powell,
84 James Edwards and Peter E. Bradshaw, and such other persons as may be associated with them, who shall become stockholders in the association or corporation hereby created in accordance with the provisions of this act, shall be and they are hereby created a body corporate and politic by the name and style of the Superior and St Croix Railroad Company, and by that name shall have perpetual succession, be competent to contract and be contracted with, sue and be sued, implead and be impleaded, answer and be answered, defend and be defended in any court whatever. The said corporation may make, have and use a common seal which it may alter or renew at pleasure; it shall be capable of acquiring by deed, lease or other conveyance a fee simple or any less estate in lands, tenements, or easements in the same, and conveying any such estate or interest by deed, lease or other conveyance, and of holding such estate or interest, or any other estate necessary for the use of the said railroad, either real, personal or mixed, and shall have and enjoy all the privileges, franchises and immunities incident to a corporation, and may do and perform all and singular the acts and matters which to any corporation it shall lawfully appertain to do and perform for the well being of said corporation."

Section 2. Section eleven of said chapter is hereby amended so as to read as follows: "The persons named in the first section shall be the first directors, and unless sooner
85 superseded by an election of directors at the first annual meeting of the company, shall hold their offices until the first Wednesday of May, A. D. 1871, and until others are chosen in their places; and in case of vacancy in the directors, by reason of the death or resignation of any director, or of his ceasing to be a stockholder, it may be filled by the remaining directors until the next annual election, or until some other person shall be elected to fill the same. The directors herein named may appoint three persons, who shall be stockholders, to be inspectors at the first election, after which the stockholders shall choose three such inspectors at the next annual election. If no inspectors are chosen, the directors may appoint three from time to time. If at any time an election of directors shall not take place on the day appointed by this act, the corporation shall not for that cause be dissolved, but an election may be held on another day, in such manner as shall be prescribed by the directors, or provided for by the by-laws."

Section 3. This act shall take effect and be in force from and after its passage.

WILLIAM E. SMITH,
Speaker of the Assembly.

THAD. C. POUND,
President of the Senate.

Approved January 20, 1871.

LUCIUS FAIRCHILD,
Governor.

86 An Act.

To amend Section 2, Chapter 326 of the private and local laws of 1870, approved March 15, 1870, entitled "An act to incorporate the Superior and St. Croix Railroad Company."

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

Section 1. Section two of said act is hereby amended so as to read as follows: Section 2. The company by this act created are hereby authorized and empowered to survey, locate and from time to time alter, change and relocate (so as not materially to change the route,) and to construct and complete, perpetually to have, use and enjoy, maintain and operate the said railroad with one or more tracks or lines, over and along the following routes, that is to say: beginning at some convenient point on the west shore of the Bay of Superior, or on the south shore of the Bay of St. Louis, in the County of Douglas, running thence southerly by a route as direct as may be practicable, through the counties of Douglas, Burnett, Polk, St. Croix and Pierre via St. Croix Falls and Hudson to Prescott, with a branch or extension running westerly from the above designated place of beginning, in Douglas County, to such a point on the Minnesota boundary, north of Nemadji
87 River, as may be deemed desirable by the directors of said railroad company; provided, said company shall have the right to construct this line of road along the westerly shore of the Bay of Superior, from the extreme end of Connor's Point to the southerly end of said bay, or such point thereof as may be deemed desirable by the directors of said company, and shall have the authority to construct and maintain a bridge across the St. Louis River at any point at or above Connor's Point in said County of Douglas, whenever the same shall be assented to by resolution of the Board of Supervisors of the town of Superior.

Section 2. This act shall be in force after its passage and publication.

W. E. SMITH,
Speaker of the Assembly.

THAD. C. POUND,
President of the Senate.

Approved March 16, 1871.

LUCIUS FAIRCHILD,
Governor.

An Act.

To amend Chapter 326 of the private and local laws of 1870, entitled "An act to incorporate the Superior and St. Croix Railroad Company," and Chapter 328 of the private and local laws of 1871, entitled "An act to amend Section 2, Chapter 326, of the private and local laws of 1870, approved March 15, 1870, entitled "An act to incorporate the Superior and St. Croix Railroad Company."

87a The People of the State of Wisconsin represented in the Senate and Assembly do enact as follows:

Section 1. Section 2 of Chapter 326 of the private and local laws of 1870, entitled "An act to incorporate the Superior and St. Croix Railroad Company," as amended by Chapter 328 of the private and local laws of 1871, entitled "An act to amend Section 2, Chapter 326, of the private and local laws of 1870," approved March 15, 1870, entitled "An act to incorporate the Superior and St. Croix Railroad Company", is hereby amended so as to read as follows:

Section 2. The said company is hereby authorized and empowered to survey, locate and construct, and to acquire, by purchase or otherwise, and to equip, maintain, operate and perpetually to have, use and enjoy, a railroad or railroads, with one or more tracks from a point or points on the Bay of Superior, at the west end of Lake Superior, in Douglas County, Wisconsin, to be selected by the board of directors, upon such route or routes as such board shall adopt, to such point or points on the Minnesota state line as such board shall select, and thence westward, upon such route or routes as said board shall adopt, to such point or points on the Pacific coast as such board shall select; and from said point or points in Douglas County easterly, upon such route or routes as said board shall adopt to or near Ashland, in the county of Ashland, in the State of Wis-
88 consin, and thence by such route or routes and to such point or points in the State of Michigan as such board

shall select; also from said point or points in Douglas county, upon such route or routes as said board shall adopt, through the counties of Douglas, Burnett, Polk, St. Croix and Pierre, or any of them, to Prescott, on the Mississippi river, with a branch from some point in one of said counties to be selected by the board of directors, to St. Paul and Minneapolis, Minnesota, or to either of said places; also from said point or points in said Douglas county or from some point to be selected by such board on any railroad or railroads which the said company is or hereafter may be authorized to construct or otherwise acquire, upon such route or routes as such board shall adopt, through the states of Wisconsin and Illinois to or into the city of Chicago in the County of Cook, in said last named state. And the said company is further authorized and empowered to survey, locate, construct, and to acquire by purchase or otherwise, and to equip, maintain and operate, and perpetually to have, use, possess and enjoy, branch lines of railroad from it to main line or lines in and into or through any state or territory of the United States, or extending into or lying within the Dominion of Canada, or any portion or province thereof, from and to such points as shall be determined by such board of directors.

Section 2. Section 3 of said Chapter 326 is hereby amended so as to read as follows: Section 3. The said company shall have the perpetual right, power and authority to transport, take and carry property and persons upon such railroad or railroads, by steam and other motive power, and to receive and store any property in any of its depots or other buildings, including elevators, and to make, construct, maintain, acquire, and use all such switches, turnouts, side tracks, spur and other tracks as it shall deem necessary; and also to construct, erect acquire and maintain all such depots, station houses, warehouses, car houses, shops, engine houses, elevator and other buildings, fixtures, structures and things necessary or convenient for use by said company in the operation of its railroad and in the transaction of its business as a carrier of freight and passengers. And said company shall have power to connect its railroad or railroads with any other railroad or railroads, and to operate the same under a lease or otherwise, or to run in connection with any such railroad or railroads, in such manner as may be agreed upon between the board of directors of said company and the board of directors of the company or companies owning or operating any such connecting railroad or railroads. And any railroad company, person, association or corporation having a railroad or railroads, constructed or partly constructed running in the direction of the line or lines of railroad which the

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said company is by this act or may hereafter be authorized to construct, acquire and operate, which said company shall agree to use or connect with, is hereby authorized to make
90 to said company (created by said Chapter 326), a lease sale or trackage arrangement, perpetual or for a time limited, of the whole or any part of the said railroad or railroads so constructed or partly constructed, together with the rolling stock, machinery, building, [tenements], or fixtures, and all property, real, personal or mixed, of the said railroad company, person, association or corporation, together with its or their franchises, rights, privileges and immunities, and in consideration of such lease, use or sale, to take or receive such rent, commutation of rental, payment or other consideration as may be agreed upon.

Section 3. Section 4 of said Chapter 326 is hereby amended so as to read as follows: Section 4. Said company shall have the right, authority and power, and it is hereby authorized and empowered subject to the provisions of section 1836 of the revised statutes, to construct, maintain and operate its railroad or railroads across, along or upon any stream of water, watercourse, street, highway, plank road, turnpike or canal which its route or routes shall intersect or touch; to carry any highway, street, turnpike or plank road which it shall touch, intersect or cross over or under its tracks, as may be most expedient for the public good; to change the course and direction of any highway, street, turnpike or plank road, when made necessary or desirable to secure more easy ascent or descent by reason of any embankment or cut made in the con-
91 struction of its railroad or railroads, and to take land necessary therefor, provided such highway or road be not so changed from its original course more than six rods, nor its distance thereby lengthened more than five rods. And the said company shall also have power, and it is hereby empowered, to cross, intersect, join and unite its railroad or railroads with any railroad now or hereafter constructed on any point on its route, and upon the grounds of such railroad corporation with the necessary turnouts, sidings and switches and other conveniences, in furtherance of the objects of its connection. And the said company shall also have power, and it is hereby empowered, to erect, purchase and maintain all necessary bridges for the use of its railroad or railroads, main and branch, over any stream of water, or watercourse, at such point or points of crossing the same as said railroad or railroads may be located or constructed, together with all necessary abutments, piers, arches, foundations and other structures.

Section 4. Section 5 of said Chapter 326 is hereby amended

so as to read as follows: Section 5. It shall be lawful for the said company, and it is hereby authorized and empowered, by its officers, engineers, servants and workmen to enter upon any land or lands for the purpose of exploring, surveying, locating and establishing the route or routes of said
92 railroad or railroads; and when the said route or routes or any portion thereof shall be determined by resolution adopted by its board of directors it shall be lawful for said company, and it is expressly authorized and empowered, to purchase and hold such land or lands for right-of-way, side-tracks, spur-tracks, watertanks, construction of road bed and maintenance of same, station houses, warehouses, elevators, engine houses, shops, and for such other purposes as may be necessary, usual or convenient for the operation of said railroad or railroads or in connection therewith; and whenever said company cannot agree with the owners and other parties interested in any such land upon the price to be paid therefor, or for the occupation thereof or for any interest therein, it shall have the right, and it is hereby expressly authorized and empowered, to acquire the same by condemnation proceedings, to the extent and in the manner provided by Sections 1845 to 1856 inclusive of the revised Statutes of 1878.

Section 5. Section 6 of said Chapter 326 is hereby amended so as to read as follows: Section 6. Upon the completion or acquisition of said railroad or railroads, or any part thereof, it shall be lawful for said company, and it is hereby authorized and empowered to demand, collect and receive such sum or sums of money for the transportation of persons and prop-
93 erty, and for the storage of property as shall be reasonable.

Section 6. Section 7 of said Chapter 326 is hereby amended so as to read as follows: Section 7. Said company shall also have full power, and it is hereby expressly authorized, to carry and transport persons and property in boats, steamships, vessels, barges and other water craft upon any of the navigable waters which its railroad or railroads shall run to, over or connect with, and to demand, receive and collect such compensation for the same as it shall from time to time deem reasonable, and for that purpose the said company is authorized and empowered to build, lease, purchase, own and use, either directly or through a corporation or corporations organized by it or otherwise for the purpose, and whose stock in whole or in part it shall own, such boats, steamships, vessels, barges and other water craft as in its judgment may be necessary or convenient for its use.

Section 7. Section 8 of said Chapter 326 is hereby amended so as to read as follows: Section 8. The said company shall

be capable in law of taking, holding and selling any lands granted to it or to any company whose property it shall acquire by the purchase or otherwise, by the government of the United States, or by this state, or by any state or territory through or in which it shall [—] acquired, and the said company may also pledge, [hypothi-] wherever the said lands may be situated, or by grant by persons, companies, corporations or associations, within or without this state, to aid in the construction or operation
95 shall be prescribed by the by-laws, and at such place, wise acquired, or authorized to be by it constructed or acquire in any manner and operate any railroad or railroads [cate], mortgage or otherwise dispose of all its right, title and interest in and to said lands, or any part thereof, and in and to any other estate, real, personal or mixed of which it, the said company, may be seized at the time of the execution of any mortgage or deed of trust, or of which it may become seized subsequent to the execution and delivery of any such instrument or instruments, including its franchise or to be a corporation and to own, maintain and operate such railroad or railroads; and the said company may sell or lease any of its branch roads however acquired, whenever it shall be declared by resolution of the board of directors, subject to the approval of the holders of record of a majority of the outstanding capital stock, that the interests of the company and its stockholders will be thereby subserved.

Section 8. Section 9 of said Chapter 326 is hereby amended so as to read as follows: Section 9. All of the affairs of said company shall be managed by a board of directors who shall be stockholders, and who are hereby invested with all the powers of the corporation save as hereinafter provided. They shall be chosen annually by ballot by the stockholders at the annual meeting of the company, which shall be held on such notice and at such time, as
95 shall be prescribed by the by-laws, and at such place, within or without the state, as shall be prescribed by the board of directors, and stated in such notice. At all meetings of the stockholders each stockholder shall be entitled to one vote for each share of stock held by him under such conditions and regulations as may be prescribed or referred to in the certificates thereof and may vote the same in person or by proxy duly authorized, and no business shall be transacted at any meeting of the stockholders unless a majority of the stock subscribed and outstanding is represented and outstanding. In all elections of directors those stockholders having the greatest number of votes shall be deemed and declared duly elected. Elections shall be conducted in such manner as shall be prescribed by the by-laws of the company, and if for any cause

an election of directors shall not be had at the time when by the provisions of this act or by the by-laws it should be had, the same may be held at any other time, on notice to be given as aforesaid, and until such election be had the directors of the [preceeding] year shall continue to act, until their successors are duly elected and qualified. The company may at any time increase or diminish the number of directors to be elected at the next annual meeting of the stockholders, and the number to be elected shall be specified in the notice of meeting, but shall never be less than five nor more than seventeen; and the said company may by vote of the majority of the stock-
96 holders, present or represented at any annual meeting, classify its directors into three classes, each of which shall be composed as nearly as may be of one-third of the directors, the term of office of the first class to expire in one year, of the second in two years, and of the third in three years. At each annual election thereafter a number of directors shall be elected for three years equal to the number whose term of office shall then expire. All vacancies shall be filled in accordance with the by-laws.

Section 9. Section 10 of said Chapter 326 is hereby amended so as to read as follows: Section 10. A majority of the board of directors shall constitute a quorum for the transaction of business. They shall meet at such times and be convened in such manner as the by-laws shall prescribe, and at such places as the board shall decide upon. Whenever all the members of the board of directors are present at any meeting it shall be competent for them, having signed upon the minutes a waiver of notice of meeting, to transact business as fully to all intents and purposes as if the said meeting had been duly convened pursuant to notice. They shall elect one of their own number to be president, and one to be vice-president, and they may elect additional vice-president and such other officers of the board, and impose upon them such duties, and confer upon them such powers as the board may by resolution prescribe. The duties of the president and other officers at meet-
97 ings of the board and stockholders shall be prescribed by the by-laws. The board of directors shall have power to appoint an executive committee, and to confer upon and to delegate to said committee the full power of the board of directors when the latter is not in session; and the board may appoint a secretary, treasurer, comptroller and such other officers and agents as it may deem necessary, and it may remove them at pleasure, prescribe their duties and compensation, and demand adequate security for the discharge of their respective duties.

Section 10. Section 11 of said Chapter 326 is hereby

amended so as to read as follows: Section 11. The capital stock of said company may be increased from time to time to such an amount as may by its stockholders be deemed necessary for the construction, acquisition or operation of record of at least a majority of all its outstanding stock, in person or by proxy, at any annual meeting, or at any meeting called for that purpose, by a notice in writing to each stockholder, to be served upon him personally, or by depositing the same in the postoffice, postage paid, properly directed to him at the postoffice nearest his usual place of residence, at least twenty days prior to such meeting, such notice shall state the time and place of such meeting, its object, and the amount to which it is proposed to increase such capital stock. No vote in favor of such increase shall take effect until the proceedings of such meeting, showing the names of the stockholders voting
98 therefor, and the amount of stock owned by each, shall be entered upon the records of said corporation, and the said company may at any time, by a vote of the holders of record of two-thirds of said outstanding stock, classify its said stock into common and preferred; and it may further classify its said stock by dividing its preferred into different classes, and it may make any or all of said classes of preferred stock cumluative or non-cumulative as to dividends thereon, and any or all of said preferred stocks may be with or without preference over any other stock or classes of stock in the event of the liquidation of the company's affairs, either through insolvency or otherwise. And the said company may make such preferred stock convertible into common stock upon such terms and conditions as may be fixed by the board of directors..

Section 11. Section 12 of said Chapter 326 is hereby amended so as to read as follows: Section 12. The said company is hereby expressly authorized to borrow from time to time such sums of money, and upon such terms, as the corporation or board of directors shall agree upon or authorize as necessary and expedient; and in its corporate name to execute and deliver its notes, bonds, debentures or other evidences of indebtedness, in such forms as shall be from time to time prescribed by the board of directors, and in such amount as shall be deemed from time to time by said board, expedient; and may
99 make the same convertible into its capital stock of any class upon such terms and conditions as to the board of directors may seem advisable, and it may pledge or hypothecate such notes, bonds, debentures or other evidences of indebtedness as collateral security for loans made to it by any person or persons, corporation, association or body politic; and it may sell such notes, bonds, debentures or other evidences

of indebtedness at such prices and upon such terms as the board of directors shall prescribe; and it may deliver the same in discharge of any liabilities which it may have incurred or proposes to incur, in the construction, purchase or other acquisition of any railroad or railroads or other property which it is or may hereafter be by law authorized to construct, purchase or acquire, and in the repair, equipment or operation of its railroad or railroads, main line or branch, or of any part or parts thereof, or of any steamships, steamboats, barges, ferries or other water craft acquired or owned by it, or which it desires to acquire by construction or purchase; and it may exchange the same for the stocks, bonds or other evidences of indebtedness of any railroad company whose railroad or railroads it is or may hereafter be authorized to purchase and it may generally use the same in such manner as shall in the judgment of the board of directors subserve and promote the corporate purposes; and the powers of said company for the purposes aforesaid, and for all purposes necessary for
100 the carrying out of the objects, or any thereof, of said company are hereby ratified and confirmed; and the said company may, and it is hereby expressly authorized and empowered, in order to secure the payment of any such notes, bonds, debentures or other evidences of indebtedness, execute and deliver from time to time collateral trust, indentures, or other security agreements or indentures, and it may from time to time execute and deliver trust deeds, or mortgages or both, as occasion may require of and upon any of its railroad or railroads, or parts thereof, constructed or thereafter to be constructed or in process of construction and may by any such mortgage or trust deed convey and mortgage all or any of its railroad track or tracks, rights of way, depot grounds, rights, privileges, franchises, immunities, exemptions, machine houses, rolling stock, furniture, tools, bridges, elevators steamboats, steamships, and all appendages and appurtenances and all other property, real, personal and mixed, in any manner whatever then belonging to the corporation or which it may thereafter acquire; and it may include in any such mortgage or trust deed any grant or grants of land, or any parts thereof, owned or held by it, or in which it may be or may become interested; and it may also grant, convey and transfer by any such mortgage or deed of trust its franchise to be a corporation and its franchise to have, possess, maintain and operate the railroad or railroads and other property and operate
101 the railroad or railroads and other property described in any such instrument uncovered thereby; and it may also give and grant to individual bond holders the right and power to vote at meetings of stockholders upon all such questions other than election of directors as may come before such

meetings; and every such mortgage, deed of trust, collateral trust, indenture or security agreement to be executed by said company shall be in such form, and contain such provisions, as the corporation or board of directors shall think proper. And in any such mortgage, deed of trust, collateral trust indenture or security agreement there may be inserted provisions limiting the right of individual holders of the bonds, notes or evidences of indebtedness secured thereby to sue or recover upon any such bonds, notes or other evidences of indebtedness, or upon any coupon annexed thereto secured by said instrument either at law or in equity, except through the trustee or trustees to whom or to which or with whom or with which such instrument is made, and every such provision shall be binding upon the holders of said bonds, notes or other evidences of indebtedness, and all thereof, and upon any court whose jurisdiction and aid may be invoked in foreclosing the lien or liens created thereby. And every such mortgage or mortgages, deed or deeds of trust or collateral trust indenture and every discharge or satisfaction thereof, may be recorded in
102 the office of the secretary of state in a proper book kept for that purpose, and the certificate of such recording endorsed on such instrument, shall have the same effect as if such instrument were recorded in the several counties in which such railroad or railroads may be located and such record in the office of the secretary of state shall be sufficient notice to all persons of the existence and lien created by said instrument, and of the property covered by the same.

Section 12. The said company may lease or purchase, and take a conveyance or assignment of the railroad or railroads franchises, immunities, and all other properties and appurtenances and the stocks or bonds, or both thereof, of any other railroad corporation, or any portion thereof within or without this state, when their respective railroads can be lawfully connected and operated together to constitute a continuous line, or when the railroad or railroads so leased or purchased will constitute branches or feeders of any railroad or railroads maintained and operated by such leasing or purchasing company; and the said company may purchase and hold the stock and bonds, or either thereof, of any railway company to which it has furnished the money for the construction of its railway, or may purchase for the money so furnished, or for such other consideration as may be agreed upon between the companies by their respective boards of directors, and take a conveyance of the whole or any portion of the franchises of
103 said corporation, and of the railway property and appurtenances.

Section 13. And the said company may and it is hereby ex-

pressly authorized and empowered to, purchase or otherwise acquire and hold the stock or bonds or both thereof of any corporation (wherever organized) the franchises, functions or operations of which may or would in any wise be utilized for the convenient or more economical or safe operation of its railroad or railroads, or of any thereof; and the said company may guarantee the principal or interest or both thereof, of the bonds, or may endorse the same, or may guarantee the dividends upon the stock or the rentals or obligations of any lease or traffic contract of any corporation which it may control by virtue of the ownership of its stock or otherwise, and may endorse the notes of any such company, or other evidences of indebtedness of any such company, and may guarantee by endorsement or otherwise, the bonds or other evidences of indebtedness, and the dividends upon the stock, or the rentals or obligations of any lease or traffic contract, of any corporation or corporations whose property the said company may now or hereafter be authorized by law to acquire by purchase or lease of the physical property thereof, or by purchase of the stock thereof.

Section 14. The said company shall, in addition to the special powers conferred upon it by said Chapter 326
104 and by this act, have possess and enjoy all of the rights, powers, privileges and immunities conferred upon railroad corporations by Chapter 87 of the revised statutes of 1878, and the acts amendatory thereof and supplementary thereto, and shall be subject, save where inconsistent herewith, to the restrictions, duties and liabilities imposed upon railroad corporations by said chapter and all amendatory and supplementary acts.

Section 15. Sections 13, 14, 15, 16, 17, 18 and 19 of said Chapter 326 are hereby repealed.

Section 16. All acts and parts of acts inconsistent with or in any manner contravening the provisions of this act are hereby repealed.

Section 17. This act shall take effect and be in force from and after its passage and publication.

T. D. WEEKS,
President of the Senate.

GEO. W. BURROWS,
Speaker of the Assembly

Approved April 15, 1895.

W. H. UPHAM, Governor

At a meeting of the stockholders of the Superior and St Croix Railroad Company, held at the office of John C. Spooner,

in the City of Madison, State of Wisconsin, on the 8th
105 day of October, 1895, at ten o'clock A. M., pursuant to adjournment, all of the stockholders being present in person and by proxy, the following resolutions were duly and unanimously adopted, by a stock vote, to-wit:

Resolved, that the action of Hiram Hayes, secretary, in applying for and procuring the amendment to the charter of the company made by Chapter 244 of the laws of 1895, entitled "An act to amend Chapter 326 of the private and local laws of 1870, entitled "An act to incorporate the Superior and St. Croix Railroad Company," and Chapter 328 of the private and local laws of 1871, entitled "An Act to amend Section 2, Chapter 326, of the private and local laws of 1870, approved March 15th, 1870, entitled "An act to incorporate the Superior and St. Croix Railroad Company," be and the same is hereby ratified and approved.

Resolved, that the president and secretary of the company be, and they are hereby authorized and instructed to execute on behalf of the company, and under its corporate seal, and to file with the secretary of state, a certified copy of the foregoing resolution accepting said chapter 244 and the amendments to the charter therein and thereby made.

State, County and City of New York—ss.

We, Edward D. Adams, President, and George H. Gardiner, Secretary of the Superior and St. Croix Railroad Company, a corporation organized and existing under the laws of the State of Wisconsin, do hereby jointly and se-
106 verally certify that we have compared the foregoing with the originals thereof as they appear upon the records of the company, and that the same are true and correct copies of said originals, and of the whole thereof, and that the same were adopted at a meeting of the stockholders of said company duly held as in the caption hereof stated and set forth.

In witness whereof, we have hereunto, pursuant to the instructions of the stockholders, as aforesaid, set our hands, and caused the common corporate seal of the company to be hereto affixed.

[Seal] EDWARD D. ADAMS, President.
GEORGE H. GARDINER, Secretary.

State of Wisconsin,
Department of State—ss.

Received this 10th day of July, A. D. 1896, and recorded in Vol. 8 of R. R. Inc. & Res. on page 625.

G. E. VANDERCOOK,
Assistant Secretary of State.

At a meeting of the stockholders of the Superior and St.

Croix Railroad Company, duly held at the office of Spooner, Sanborn, Kerr & Spooner, in the City of Madison, State of Wisconsin, on the 1st day of July, A. D. 1896, at two
107 o'clock P. M., all of the holders of record of the capital stock of said company being duly represented at said meeting, the following, among other proceedings, were duly had, to-wit:

On motion of Mr. Spooner, seconded by Mr. Reed, the following resolution was, by a stock vote, unanimously adopted, every share of the outstanding stock of said company voting therefor, to-wit:

Resolved, that the corporate name of this corporation be, and the same is hereby, changed from "The Superior and St. Croix Railroad Company" to "Northern Pacific Railway Company," which latter name is hereby adopted as the corporate name of this corporation.

State, County and City of New York—ss.

I, George H. Gardiner, Secretary of the Superior and St. Croix Railroad Company, and the custodian of its books, records and common corporate seal, do hereby certify that I have compared the above and foregoing with the original resolution, and with the record of its adoption above set forth, and that the same is a true and correct copy of the said resolution, and of the whole thereof, and of the record of the adoption thereof at the meeting of the stockholders of said company duly held as in the caption hereof set forth.

In witness whereof, I have, pursuant to the order of the stockholders in this behalf duly made, hereunto set my
108 hands and affixed the said corporate seal this eighth day of July, A. D. 1896.

[Seal] GEORGE H. GARDINER,
Secretary, Superior and St. Croix Railroad Company.

State of Wisconsin,
Department of State—ss.

Received this 10th day of July and recorded in Vol. 8 of R. R. Inc. & Res. on page 624.

G. E. VANDERCOOK,
Assistant Secretary of State.

United States of America,

The State of Wisconsin, Department of State, To all to whom these presents shall come,

I, W. L. Houser, Secretary of State of the State of Wiscon-

sin, and Keeper of the Great Seal thereof, do hereby certify that the annexed copy of an act to incorporate the Superior and St. Croix Railroad Company and amendments thereto, including one changing name of the company to Northern Pacific Railway Company, have been compared by me with the enrolled acts and resolutions on file in this department, and that the same is a true copy thereof, and of the whole of
109 such acts and resolutions.

In testimony whereof, I have hereunto set my hand and affixed the Great Seal of the State at the Capitol, in the City of Madison, this 13th day of July, A. D. 1903.

[Seal] W. L. HOUSER,
Secretary of State.

110 State of Minnesota,
County of Ramsey—ss.

I hereby certify and return, that at the City of St. Paul, County and State aforesaid, on the 16th day of November, A. D. 1905, I served the summons hereto attached upon the within named John A. Humbird, by leaving a true and correct copy thereof at the house of his usual abode with Mrs. John H. Humbird a person of suitable age and discretion then residing therein, and I further certify and return that at the said St. Paul, County and State aforesaid, on the said 16th day of November A. D. 1905 I served the said summons hereto attached upon the within named Frederick Weyerhaeuser by leaving a true and correct copy thereof at the house of his usual abode with a person of suitable age and discretion then residing therein whose name is unknown.

Dated this 17th day of November A. D. 1905.

ANTON MIESEN,
Sheriff of Ramsey Co., Minn.,
By Joseph B. Thor, Deputy.

Paid:

Sheriff's fee service	$1.50
Travel	.60
	$2.10

State of Minnesota,
County of St. Louis,

District Court, Eleventh Judicial District.

111 Charles D. Campbell, Plaintiff,
vs.
John A. Humbird & Frederick Weyerhaeuser, Defendants.

The State of Minnesota, To the above named defendants:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, which is filed in the office of the Clerk of the District Court of the 11th Judicial District, in and for the County of St. Louis and State of Minnesota, and to serve a copy of your answer to the said complaint on the subscriber, at his office in Duluth in said county, within 20 days after the service of this summons upon you exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated at Duluth, Minn., November 16th, 1905.

H. H. HOYT,
Plaintiff's Attorney,
310 Manhattan Building, Duluth, Minn.

Received Nov. 16, 1905. Anton Miesen, Sheriff, By Moran, Deputy.

Filed in my office at ..o'clock .. m. Nov. 25, 1905, G. P. Johnson, Clk. Dist. Court, By V. A. Dash, Deputy.

State of Minnesota,
County of St. Louis.

District Court.

112 Charles D. Campbell, Plaintiff,
vs.
John A. Humbird and Frederick Weyerhaeuser, Defendants.

Now come the above named John A. Humbird and Frederick Weyerhaeuser and by their petition respectfully show to the court:

This action was begun by service of the summons and complaint upon the petitioners on November 16, 1905, and is a civil action now pending in this Court.

The petitioners have not yet served or filed their answer in the cause and the time for answering under laws of Minnesota, will not expire until December 6, 1905.

The matter in dispute in this action exceeds the sum of Two Thousand Dollars exclusive of Interest and costs, the value of the property in dispute being at least Three Thousand Dollars.

As appears upon the face of the complaint, this suit involves a federal question. All the plaintiff's rights depend (a) upon

the construction of the act of congress of July 2, 1864, granting lands to aid in the construction of a railroad from Lake Superior to Puget Sound, and the amendments of that Act, among others the joint resolution of Congress of May 31, 1870, pertaining to the indemnity under said grant, and (b) upon the interpretation and effect to be given to the act of congress of July 1, 1898, also relating to the said land. As appears upon the face of the complaint, the decision of the case must turn upon the effect and interpretation of the said acts of congress.

113 The defendants herewith offer and file a bond as provided by the laws of the United States upon the removal of causes from a state court to the United States Court, which bond is hereto attached and submitted to the court.

Wherefore your petitioners pray this honorable court to accept the said bond and that said cause be removed into the circuit court of the United States for the District of Minnesota and that this court proceed no farther in the premises.

Dated November 29, 1905.

JOHN A. HUMBIRD,
FREDERICK WEYERHAEUSER,
By C. W. Bunn, Defendant's Attorney Northern Pacific General Office Building, corner Fourth & Broadway Streets, St. Paul, Minnesota.

State of Minnesota,
..... County—ss.

H. Oldenburg being duly sworn, deposes and says, that he is agent of the petitioners named in the foregoing petition and knows the contents thereof and is authorized by the petitioners to make this petition and affidavit, that the petition is true to his own knowledge, except as to matters stated therein on information and belief, and as to such matters he believes it to be true; that as to the value of said property his belief is based upon careful estimates and examinations of the land itself by agents of the defendants, and he verifies this petition because both the petitioners are absent from the State of Minnesota where deponent resides.

H. OLDENBERG.

114 Subscribed and sworn to before me this 4th day of December, 1905.

[Notarial Seal] CORYATE S. WILSON,
Notary Public, ... County, Minnesota.
My commission expires .....

District Court.

State of Minnesota,
County of St. Louis.

Charles D. Campbell, Plaintiff,
vs.
John A. Humbird and Frederick Weyerhaeuser, Defendants.

Know all men by these presents: That we, John A. Humbird and Frederick Weyerhaeuser of Saint Paul, Minnesota, as principals, and ..... of ..... as surety, are held and firmly bound unto Charles D. Campbell, the plaintiff in the a'bove entitled suit, in the penal sum of five hundred dollars lawful money of the United States, for the payment of which well and truly to be made the said principals bind themselves, their heirs, executors, administrators and assigns, and the said surety binds himself, his heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated on the 29th day of November, A. D. 1905.

The condition of the above obligation is such that if said John A. Humbird and Frederick Weyerhaeuser, the
115 defendants in an action now pending in the district court of St. Louis County, Minnesota, shall enter in the Circuit Court of the United States for the District of Minnesota, on the first day of the next session thereof, a copy of the record in said suit, and shall pay all costs that may be awarded by the said Circuit Court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also then appear and enter special bail in said suit, if special bail was originally requisite therein, and shall enter appearance of said defendants in said court, then this obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof the said obligors have hereunto set their names and seals this 29th day of November A. D. 1905.

[Seal] JOHN A. HUMBIRD.
By C. W. Bunn, his Attorney.

[Seal] FREDERICK WEYERHAEUSER.
By C. W. Bunn, hrs Attorney

[Seal] H. OLDENBURG.

State of Minnesota,
..... County—ss.

H. Oldenburg came before me personally and being by me first duly sworn deposes and says that he is the person named

as surety in the foregoing bond; that he is a resident and freeholder of and within the State of Minnesota and worth the amount of five hundred dollars specified in the foregoing bond above his debts and liabilities and exclusive of his property which is exempt from execution.

H. OLDENBURG.

116 Subscribed and sworn to before me the 4th day of December, 1905.

[Notarial Seal] CORYATE S. WILSON,
Notary Public, ... County, Minnesota.

My commission expires.....

Filed in my office at .. o'clock .. M., Dec. 4, 1905.

J. P JOHNSON, Clk. Dist. Court.
By H. C. Wedmark, Deputy.

District Court.

State of Minnesota,
County of St. Louis.

Charles D. Cambell, Plaintiff,
vs.
John A. Humbird and Frederick Weyerhaeuser, Defendants.

Upon the filing and presentation to the court of the petition of John A. Humbird and Frederick Weyerhaeuser to remove this suit to the circuit court of the United States, District of Minnesota, together with the bond in accordance with law

It is hereby ordered that the said petition and bond be accepted and that this court proceed no farther with the cause.

Dated Dec. 4, 1905.

HOMER B. DIBELL, Judge.

Filed in my office at .. o'clock .. M., Dec. 4, 1905.

J. P. JOHNSON, Clk. Dist. Court,
By J. S. Moody, Deputy.

117 District Court, Eleventh Judicial District.

State of Minnesota,
County of St. Louis—ss.

I, J. P. Johnson, Clerk of the District Court, St. Louis County, and State of Minnesota, do hereby certify that I have compared the foregoing papers writing with the original Complaint, Summons and Return, Petition and Bond for Removal to U. S. Circuit Court and Order for Removal to U. S. Circuit Court, in the action therein entitled, now remaining of

record in my office, and that the same is a true and correct copy and transcript of said original papers and the whole thereof.

Witness my hand and seal of said court, at Duluth, this 9th day of December, A. D. 1905.

[District Court Seal] J. P. JOHNSON, Clerk,
By H. C. Wedmark, Deputy Clerk.

Endorsed: Transcript from St. Louis County State Court. Filed Dec. 9th, 1805. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

That on the 3rd day of January, A. D. 1906, there was filed with said Clerk a Stipulation extending the time in which defendants can answer in said cause, in the words and figures following, to-wit:

United States Circuit Court, District of Minnesota, Fifth Division.

118 Charles D. Campbell, Plaintiff,
vs.
John A. Humbird and Frederick Weyerhaeuser, Defendants.

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the time to plead, answer or demur to the complaint in the above entitled cause be and is hereby extended to and including the first Monday in February, 1906.

H. H. HOYT,
Counsel for Plaintiff.

C. W. BUNN &
JAMES B. KERR,
Counsel for Defendants.

Dated December 27th, A. D. 1905.

Endorsed: Stipulation extending time to plead until first Monday in February, 1906. Filed January 3, 1906. Henry D. Lang, Clerk, by Thos. H. Pressnell, Deputy Clerk.

119 That on the 9th day of December, A. D. 1905, there was filed with said Clerk a stipulation extending the time in which the defendants could answer to the first Monday in January, A. D. 1906, and an order of Court permitting such extension was duly entered in the Term Minutes of said Court; and that on the 3rd day of January, A. D. 1906, there was filed with said Clerk a stipulation further extending the time in which defendants could answer until the first Monday in February, A. D. 1906.

That on the 16th day of January, A. D. 1906, there was filed

with said Clerk the joint answer of the defendants in said cause, in the words and figures following, to-wit:

120 United States Circuit Court, District of Minnesota, Fifth Division.

Charles D. Campbell, Complainant,
vs.
John A. Humbird and Frederick Weyerhaeuser, Defendants.

Answer.

Come now the defendants, John A. Humbird and Frederick Weyerhaeuser and answer the complaint herein as follows:

I.

Defendants admit that the land described in the bill of complaint was and is chiefly valuable for the timber standing thereon, and has no valuable depo-sit of gold, silver, cinnabar, copper or coal, and was at the times mentioned in the bill of complaint and now is uninhabited, in a state of nature and unimproved, but defendants say that the land is susceptible of and fit for cultivation when cleared of the timber thereon.

II.

Defendants admit that on or about October 26, 1895, Charles D. Campbell applied to the United States District Land Office at Duluth to purchase the land in question under the provisions of the act of Congress of June 3, 1878; that he tendered his written statement as alleged, with the proper and legal fees, to the register and receiver of said land office, and demanded of them to receive and file his application to purchase and issue notice in accordance with law, and
121 that such application was refused by the said land officers for the reason that it conflicted with the selection filed by the Northern Pacific Company; that said Campbell appealed and decisions were rendered upon his appeal substantially as alleged in the bill. Defendants allege that at the time of the said application to purchase and ever since the land in question was reserved and appropriated by the selection thereof, by the Northern Pacific Railroad Company as herein after more fully set forth. That it was not subject to entry or purchase under the act of Congress of June 3, 1878, and the register and receiver of the said land office had no jurisdiction or authority to receive said application.

Defendants deny that the said decisions in the land department were made without any trial or hearing or without any legal or competent evidence. On the contrary these defendants

allege that the plaintiff received due and sufficient notice and that each and every action and decision of the land department was had after such notice and a full hearing and upon a due consideration of all the facts.

Defendants admit that a patent for the land in question was thereafter issued by the United States, and allege that it was duly executed on the 13th day of November, 1905. The defendants admit that at the time and before the issuance of said patent the Northern Pacific Railway Company, the patentee, had knowledge and notice of the claim of the plaintiff.

III.

Defendants admit that the land in question is situated outside the limits of the grant by act of Congress approved July 2, 1864, but within the extended indemnity limits of said grant created by the joint resolution of Congress approved May 31, 1870. Defendants deny that the selection of the land
122 in question as indemnity was illegal.

Defendants admit that the basis of the railroad selection was the loss of the S. E. 1/4 of section 19, T. 133, N., R. 34 W., which is about 147 miles (not 200 as alleged in the bill) west and 50 miles south of the land in controversy; the lost lands being on the south side of the railroad land while the selected land is on the north side. The defendants deny that the Railroad Company was not entitled to make said selection and deny that it disregarded, wilfully or otherwise, the law or rules of the United States Land Department. The defendants deny that when this selection was made any rule of the department or law required the selector to swear to or otherwise show the various matters and things alleged in this respect in the bill of complaint.

The defendants deny that there were at the date of the making of this selection many acres, as alleged in the bill, of vacant unappropriated lands, or any acres within proper sections and limits, lying nearer the loss than the lands selected or which ought to have been selected as indemnity before the lands in question.

Defendants admit that the affidavit attached to the selection list in question is stated with substantial accuracy in the bill, but deny that no lost lands were stated in the selection, the truth being that losses were specified in acres but not by specific descriptions, all of which was then according to the rules of the land department. It is true that afterward the Railroad Company was directed to rearrange its list so as to specify a particular lost tract for every tract selected, and the

affidavit attached to said rearranged list is stated with substantial correctness in the bill.

123 Except as qualified, admitted or denied the defendants deny each and every allegation contained in paragraph VI. of the bill.

IV.

Defendants deny that under the order of May 28, 1883, or otherwise, the Secretary of the Interior was empowered to select indemnity lands for the benefit of the Northern Pacific Company, and defendants deny that list No. 15 was filed for the benefit of the Secretary or to enable him to make selection from the lands therein described.

Defendants deny that under the order of May 28, 1883, or otherwise, the Northern Pacific Railroad Company selected nearly every acre of vacant, unappropriated public land or even a large proportion of such land in both or either of the indemnity limits of its land grant; and defendants deny that the Northern Pacific Company placed in its selection lists of 1883, seventy-five thousand acres of land more than it had lost.

Defendants admit that certain lands selected in the selection lists described in the bill of complaint were afterwards relinquished, but defendants deny that such lands were relinquished because more lands were selected as indemnity than were lost from the grant.

Defendants have no knowledge or information sufficient to form a belief as to whether at the time the land in controversy was selected there were other lands subject to selection which were situated nearer to the lost land specified as a basis for such selection, and they have no knowledge or information sufficent to form a belief as to whether the lands mentioned in the bill of complaint as having been selected after Duluth list No. 15 was filed and which were afterwards relinquished, were subject to selection when list No. 15 was filed, or why they were relinquished.

124 V.

Defendants deny that the Northern Pacific Railroad Company, before the issuance of the patent for the land in question, had received more land under its said grant than it was entitled to receive upon the side of the road on which said land was situated, or at all.

VI.

Defendants admit that on November 13, 1895, the Secretary

of the Interior rendered a decision declaring that the eastern terminus of the Northern Pacific railroad, under the act of congress of July 2, 1864, was not farther east than Superior, and on August 27, 1896, the Secretary of the Interior rendered another decision wherein he held that the eastern terminus of said grant, under the act of July 2, 1864, was at Duluth, and on December 24, 1896, the land department prepared a diagram showing the eastern terminus of said grant as so defined by the Secretary's decision of August 26, 1896, and a copy thereof was transmitted to the Duluth Land Office on January 22, 1897.

Defendants admit that on July 17, 1897, the Commissioner of the General Land office addressed a communication bearing that date to the register and receiver of the Duluth land office, of which a copy is set out in the bill of complaint. Defendants admit that the notice required by said communication was given as directed. Defendants allege that said decisions of the Secretary of the Interior of November 13, 1895, and August 27, 1895, and the directions contained in the communications of July 17, 1897, were erroneous and were rendered and given under a mistake of law as to the true eastern terminus of said land grant, which was and is in fact at Ashland in the state of Wisconsin, and neither by virtue of said mistaken directions of the Commissioner of the General
125 Land Office, nor otherwise, was any action required by the Northern Pacific Railroad Company to protect or enforce its rights to the land in question..

Defendants deny that the aforesaid action of the Interior Department restored the land in question to the public domain, and these defendants allege that at all the times mentioned in the bill of complaint the land was appropriated for the benefit of the Northern Pacific Railroad Company by virtue of its selection thereof as indemnity.

Defendants admit that on July 12, 1900, under the direction of the Secretary of the Interior the Commissioner of the General Land Office rescinded the previous action of the land department and declared the selection of the lands in question reinstated.

Defendants admit that on February 28, 1898, an order was made by the land department of which an extract is correctly copied in the bill of complaint.

Defendants admit that instructions were issued to the Duluth Land office on April 4, 1898, as set forth in the bill of complaint.

VII.

Defendants admit that instructions were issued by the Interior Department on February 14, 1899, regarding the adjustment of the Northern Pacific land grant under the provisions of the act of Congress of July, 1, 1898, as set forth in the bill of complaint, but except where the said bill of complaint purports to copy verbatim the provision of said instructions defendants beg to leave to refer to the published instructions for the text thereof.

Defendants admit that the Interior Department found and held by its published regulations dated November 21, 1899, that the Northern Pacific Railway Company was the lawful successor in interest of the Northern Pacific Rail-
126 road Company as to all lands within the grant to the last named company, and these defendants allege that said finding by the Interior Department as to such successorship was based upon good and sufficient evidence and is final and conclusive. Defendants deny that the Northern Pacific Railway Company is not such successor and allege that it is in fact such successor.

VIII.

Defendants admit that their claim of title to the land in question is derived from the Northern Pacific Railway Company. Defendants deny that the patent for said land issued by the United States to the Northern Pacific Railway Company was issued under a mistake of law or without authority. Defendants admit that the lands in question and the right to receive a patent therefor from the United States passed from the Northern Pacific Railroad Company by a sale held in pursuance of a decree of the Circuit Court of the United States for the Eastern District of Wisconsin rendered upon the supplemental bill of The Farmers' Loan and Trust Company in a certain consolidated cause entitled the Farmers' Loan and Trust Company versus Northern Pacific Railroad Company and others, defendants, and in pursuance of a similar ancillary decree entered in the Circuit Court of the United States for the District of Minnesota in an ancillary proceeding prosecuted therein under the same title, and that the portion of the decree or order of June 5, 1899, set out in the bill of complaint is correctly stated:

Defendants deny that the court was without authority to make order of sale under which the Northern Pacific Railway Company purchased said land, but defendants allege that the Circuit Court of the United States for the Eastern
127 District of Wisconsin and the Circuit Court of the United States for the District of Minnesota has juris-

diction of all the parties and of the subject matter in said cause and full power and authority to make and enter said order and decree of sale.

Defendants admit that in pursuance of said decree Alfred L. Cary, Special Master named therein, executed the same and reported to the court that he had sold to the Northern Pacific Railway Company the lands, rights and titles as alleged in the bill of complaint.

Defendants admit that on September 22, 1899, the said Alfred L. Cary as Special Master, by deed dated that day, conveyed to the Northern Pacific Railway Company the property so sold as aforesaid, including the land in question, and that said deed contains the recital quoted in the bill of complaint.

Defendants deny that at the time of the sale to the Northern Pacific Railway Company the Northern Pacific Railroad Company had no interest upon which such sale could attach.

IX.

Defendants deny that the Northern Pacific Railway Company had no power or authority to purchase the land in question and the right thereto, and they deny that the patent of the United States therefor was issued without authority or under a mistake of law or fact.

Defendants deny that the Northern Pacific Railway Company is the successor of the Superior and St. Croix Railroad pany and defendants allege that the name "Superior and St. Croix Railroad Company" has merely been changed to "Northern Pacific Railway Company."

Defendants deny that the legislature of Wisconsin did not grant to the Northern Pacific Railway Company any authority to hold or possess lands other than such as might be
128 required for the operation of its railroad. Defendants admit that Exhibit "D" attached to the bill of complaint contains true copies of the act to incorporate the Superior and St. Croix Railroad Company and of certain acts amendatory thereof and supplemental thereto and of the record of certain proceedings taken to change the name of the Superior and St. Croix Railroad Company to Northern Pacific Railway Company.

X.

Further answering, defendants allege that they are the owners of the land described in the bill of complaint herein. Defendants allege that said land is situated more than thirty and less than forty miles distant from the line of the Northern

Pacific Railroad as said line was definitely located under the act of Congress approved July 2, 1864, and the acts amendatory thereof granting lands to the Northern Pacific Railroad Company to aid in the construction of a line of railroad from Lake Superior to Puget Sound and within the indemnity limits provided by the joint resolution of Congress approved May 31, 1870, amendatory of the act of July 2, 1864; that said land was duly selected under the terms of said joint resolution by the Northern Pacific Railroad Company, and in pursuance of such selection was thereafter patented by the United States to the Northern Pacific Railway Company, which last named company was then the successor in interest of the Northern Pacific Railroad Company, on October 18, 1905; that on January 19, 1900, the said Northern Pacific Railway Company executed and delivered to defendants its deed of conveyance, purporting to convey said land, which deed contained full covenants on behalf of said Railway Company, that it was seized of said land and had good right and lawful authority to convey the same, and these defendants say that they have elected to take and receive, by virtue of said covenants, and have thereby
129 become vested with the full title to said land under and through the Northern Pacific Railway Company.

Defendants deny every matter and thing in said bill of complaint contained not hereinbefore expressly admitted.

Wherefore, defendants pray that the bill of complaint herein be dismissed with costs in favor of those defendants.

JOHN A. HUMBIRD and
FREDERICK WEYERHAEUSER
By C. W. Bunn & James B. Kerr,
Their Solicitors.

United States of America,
District of Minnesota,
County of Ramsey—ss.

F. Weyerhaeuser being first duly sworn on oath says: That he is one of the defendants above named and makes this affidavit on behalf of his co-defendant and himself; that he has read the foregoing answer and knows the contents thereof and that the same is true.

F. WEYERHAEUSER.

Subscribed and sworn to before me this 13th day of January, A. D. 1906.

[Notarial Seal] A. E. McCARTNEY,
Notary Public, Ramsey County, Minnesota.

My commission expires May 25, 1907.

Endorsed: Answer, Filed January 16, 1906. Henry D. Lang, Clerk, by Thos. H. Pressnell, Deputy Clerk.

That on the 27th day of January, A. D. 1906, there was filed with said clerk separate replications to the answer in said cause, in the words and figures following, to-wit:

130 United States Circuit Court, District of Minnesota, Fifth Division.

Charles D. Campbell, Complainant,

v.

John A. Humbird and Frederick Weyerhaeuser, Defendants.

This replicant, saving and reserving to himself now and at all times hereafter, all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer to said defendant Frederick Weyerhaeuser, for replication thereunto, says, that he will aver, maintain and prove his bill of complaint to be true, certain and sufficient in the law to be answered unto; and that the answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this replicant without this, that any other matter or thing whatsoever in answer contained, material or effective in law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this replicant is and will be ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays as in and by his said bill he has always prayed.

H. H. HOYT,
Counsel and Solicitor for Complainant.

To C. W. Bunn and James B. Kerr, Counsel and solicitors for Defendants.

131 Endorsed: Replication to Defendant Weyerhaeuser. Filed January 27, 1906. Henry D. Lang, Clerk, by Thos. H. Pressnell, Deputy Clerk.

United States Circuit Court, District of Minnesota, Fifth Division.

Charles D. Campbell, Complainant,

v.

John A. Humbird and Frederick Weyerhaeuser, Defendants.

This replicant, saving and reserving to himself now and at all times hereafter, all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer to said defendant John A. Humbird, for replication thereunto, says, that he will

aver, maintain and prove his bill of complaint to be true, certain and sufficient in the law to be answered unto; and that the answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this replicant without this, that any other matter or thing whatsoever in answer contained, material or effective in law to be replied unto, confessed, and avoided, traversed, or denied, is true; all which matters and things this replicant is and will be ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays as in duty by his said bill he has always prayed.

H. H. HOYT,
Counsel and Solicitor for Complainant.

132 To C. W. Bunn and James B. Kerr, Counsel and Solicitor for Defendants.

Endorsed: Replication to Defendant Humbird. Filed January 27, 1906. Henry D. Lang, Clerk, by Thos. H. Pressnell, Deputy Clerk.

133 That on the 24th day of December, A. D. 1906, there was filed with said Clerk a Notice of Trial and Note of Issue in said cause, and that in compliance with the request in said Note of Issue contained said cause was, by said Court, duly placed on the trial calendar of said Court for the January, A. D. 1907, term thereof, for final hearing.

That on the 13th day of February, A. D. 1907, said cause was, by order of the Court, consolidated with the cause entitled Herbert H. Hoyt vs. Frederick Weyerhaeuser and John A. Humbird for the purpose of final hearing, in the words and figures following, to-wit:

Herbert H. Hoyt,
No. 497. vs. In Equity.
Frederick Weyerhaeuser and John A. Humbird.

and

Charles D. Campbell,
No. 507. vs. In Equity.
Frederick Weyerhaeuser and John A. Humbird.

Upon the motion of H. H. Hoyt, Esq., solicitor for complainant, solicitor for defendants consenting thereto, it is by the Court

Ordered: That said causes be, and they hereby are consolidated for the purposes of the final hearing thereof, and that they be tried together as one and the same cause.

And it is by the Court, further

Ordered: That the final hearing of said consolidated
134 cause be, and the same hereby is set for Monday, March 4th, A. D. 1907, at ten o'clock. A. M.

That said consolidated cause came on for final hearing on the 4th day of March, A. D. 1907, and said hearing was concluded on the day following, to-wit: on the 5th day of March, A. D. 1907, and proceedings were had therein, as recorded in the term minutes of said Court, as follows, to-wit:

Herbert H. Hoyt,
No. 497. vs. In Equity.
Frederick Weyerhaeuser and John A. Humbird.

and

Charles D. Campbell,
No. 507. vs. In Equity.
Frederick Weyerhaeuser and John A. Humbird.

The above entitled causes, having heretofore been consolidated for the purpose of final hearing, coming on for final hearing at this time, H. H. Hoyt, Esq., appears on his own behalf in the case of Herbert H. Hoyt vs. Frederick Weyerhaeuser, et al, and as solicitor for complainant in the case of Charles D. Campbell vs. Frederick Weyerhaeuser, et al, and Messrs. C. W. Bunn and M. T. Saunders appear as solicitors for the defendants in both of said causes; Mr. Hoyt opens and argues the first cause on his own behalf and Mr. C. W. Bunn opens and concludes his argument therein on behalf of the de-
135 fendants.

And said arguments not being concluded at the hour of adjournment, it is, by the Court

Ordered: That further proceedings herein be and the same hereby are postponed and continued until to-morrow morning at ten o'clock.

March 5, 1907.

This day come again the parties to said consolidated cause, by their respective solicitors, and further proceedings are had therein as follows, to-wit:

H. H. Hoyt, Esq., solicitor on his own behalf closes his argument in said first cause.

C. W. Bunn, Esq., closes on behalf of the defendants.

H. H. Hoyt, Esq., opens and concludes his argument on behalf of complainant in said second cause.

C. W. Bunn, Esq., opens and concludes his argument on behalf of the defendants.

And the Court having heard the evidence and the arguments and statements of the respective counsel of all the parties to said causes, being fully informed in the premises, takes the same under advisement.

That the evidence submitted in said cause No. 507 at the final hearing is as follows, to-wit:

136 United States Circuit Court, District of Minnesota, Fifth Division.

Charles D. Campbell, Complainant,
No. 507. vs.
John Humbird and Frederick Weyerhaeuser, Defendants.

Deposition taken before Thomas H. Pressnell, General Examiner in Chancery, by order of the Court, dated April 21, 1906, together with the exhibits offered in connection therewith, July 3, 1906.

Appearances: H. H. Hoyt, Attorney for Complainant, Grafton Mason and M. T. Saunders, Attorneys for Defendants.

Documentary evidence and deposition of Chas. D. Campbell.

Charles D. Campbell, called as a witness on his own behalf, being first duly sworn, testifies as follows:

Direct Examination.

By Mr. Hoyt:

Q. Where do you live? A. Duluth.

Q. What is your age? A. Forty-four.

Q. You remember a tract of land that you filed a timber and stone application for in this county? A. Yes sir.

Q. Do you remember the description?

137 A. The SE ¼ of Section 21, Township 54, North of Range 12, I believe.

Q. Timber and stone application? A. Yes sir.

Q. Do you remember the time you made your application?

Mr. Sanders: Objected to as incompetent, irrelevant and immaterial.

A. It was in 1894, I believe, or 5.

Q. Well, don't you know whether it was 1894 or 1895 when you made your application? A. Yes sir.

Q. Which was it? A. 1895.

Q. Did you examine the land before you made your application? A. Yes sir.

Q. After you made your application, you made another application? A. Yes, sir.

Q. How many applications did you make?

A. Three, if I remember right.

Q. Did you locate that land for your own benefit or for the benefit of any one else?

A. For my own benefit.

Q. Have you sold or offered to sell it? A. No sir.

Mr. Sanders: We object to all this testimony on the ground that it is incompetent, irrelevant and immaterial.

138 Mr. Hoyt: Were you born in this country?

A. No sir.

Q. Are you a citizen of the United States? A. Yes sir.

Q. Where were you naturalized? A. Duluth.

Q. Have you any evidence of it? A. Yes sir.

Mr. Hoyt: We offer in evidence complainant's Exhibit F.

Mr. Sanders: Object to Exhibit.

Mr. Hoyt:

Q. Have you ever applied for land under the timber and stone act until this time? A. No sir.

Q. Have you at all times since your application in 1895 for this land been ready and willing to complete your entry by paying the amount the Government required for acquiring that land? A. Yes sir.

Q. Why have you not completed your entry?

A. Well, because I couldn't. I had contest on the land, and before I got that off, I couldn't do anything after that.

Q. Couldn't do anything on account of an order from the Department that nothing further should be done—

A. Yes sir.

Q. —in such cases? A. Yes sir.

139 Mr. Sanders: Move to strike out all of the testimony of this witness for the reason that it is incompetent, irrelevant and immaterial.

Mr. Hoyt; We now wish to offer Complainant's Exhibit "G" in evidence, being an exemplified copy of the approval by the Secretary of the Interior of the selection of Northern Pacific Railroad Company of the SE 1/4 of Section 21, Township 54 North of Range 12 West, in lieu of land claimed to be listed in the place limit to-wit: The SE 1/4 of Section 19, Township 133 North of Range 34 West. The date of approval November 10, 1905.

Complainant's Exhibit "H" offered in evidence, being an exemplified copy of the Joint Resolutions offered in the Senate of the United States, April 8, 1896, by Senator Mitchell.

Mr. Sanders: Objected to as incompetent, irrelevant and immaterial.

Mr. Hoyt: And this also includes report from Mitchell of April 21, 1896, and an amendment made May 16, 1896, and an amendment made May 25, 1896, and an amendment made June 5, 1896, and another amendment made by Senator Nelson, June 5, 1896, and another proposed amendment by Senator Smith, June 6th, 1896.

Mr. Sanders: Objected to as incompetent, irrelevant and immaterial, and not admissible under the pleadings.

140 Mr. Hoyt: Complainant's Exhibit "I" offered in evidence, being map to which is attached the following certificate:

"Department of the Interior, General Land Office, Washington, D. C., June 14th, 1906.

I hereby certify that the annexed copy of so much as is shown thereon of the official diagram, showing the limits of the grant to the Northern Pacific Railroad Company, is a true and literal exemplification of the original diagram on file in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington, on the day and year above written.

(Signed) G. T. POLLOCK,
Acting Commissioner of the General Land Office.

Complainant's Exhibit "K "offered in evidence, being the resolution from the Northern Pacific Railroad Company Board of Directors, July 13, 1898 (exemplified copy), in reference to the acceptance of the railroad company with the Act of Congress Sundry Civil Appropriation bill, approved July 1, 1898.

Complainant offers in evidence Exhibit "L," being exemplified copy of the Northern Pacific Railroad Company's Communication to the Secretary of the Interior, July 3, 1882, the filing of the map of the definite location of the Northern Pacific Railroad Company from a point on the main line at its junction with the St. Paul and Duluth Railroad near the right bank of the St. Louis River, in the State of Minnesota, thence in an easterly direction to a point in Section 15, Township 47 North, Range 2 West of the Fourth Principal Meridian, in the State of Wisconsin, filed July 6, 1882.

Mr. Sanders: Above offers objected to as incompetent, irrelevant and immaterial.

141 Mr. Hoyt: Complainant offers in evidence "Exhibit "M", being an exemplified copy of report from the

Committee of the Senate of the United States, dated April 21, 1896, by Senator Mitchell, of Oregon, Committee on the Judiciary.

Mr. Sanders: Objected to as incompetent, irrelevant and immaterial, and not admissible under the pleadings.

Mr. Hoyt: Complainant offers in evidence Exhibit "N", being extract from the Journal of the Senate of the United States of the Fifty-Fourth Congress, First Session, dated April 8, 1896, pages 228 and 229.

Mr. Sanders: Objected to as incompetent, irrelevant and immaterial.

Stipulation.

It is hereby stipulated by and between the parties hereto that attached to Northern Pacific Railroad Company Selection list, No. 15, filed October 17, 1883, and which list embraces the land in controversy in this case, is a certificate in words and figures following, to-wit:

"State of Minnesota,
County of St. Louis—ss

"I, Charles B. Lamborn, being first duly sworn, deposes and say, That I am the Land Commissioner of the Northern Pacific Railroad Company; that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by said Northern Railroad Company as enuring to said company to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the Northern route for which a land grant was made by the act of Congress approved July 2, 1864, and by the Joint Resolution approved May 31st, 1870; that
142 the said lands are vacant, unappropriated and are not interdicted mineral or reserved lands, and are of the character contemplated by the grant being within the limits of forty miles on each side of the line of the route for a continuous distance of.....miles of said railroad, commencing ..... and ending .....

(L. S.) CHAS. B. LAMBORN.

Sworn to and subscribed before me this 15th day of October, 1883."

[Seal] GEO. B. BOARD.
Notary Public.

And it is further stipulated that attached to Northern Pacific Railroad Company's certified list No. 15-B (which list embraces the land here in controversy) is certificate in words and figures as following, to-wit:

"Whereas, the Northern Pacific Railroad Company has heretofore, to-wit, on the 17th day of October, 1883, duly selected under the directions of the Secretary of the Interior those certain tracts and parcels of land particularly set forth and described in Duluth list No. 15, filed in the United States District Land Office, at Duluth, Minnesota, on the 17th day of October, 1883, as indemnity for certain tracts and parcels of odd numbered sections of land within the limits of the grant to said railroad company, which said tracts were reserved, sold, granted, and otherwise appropriated, or not free from pre-emption or other claims or rights at the time the line of its road was definitely located in accordance with the provisions of the act of congress approved July 2, 1864, and of the Joint resolution of Congress approved May 31, 1870, which lands so situated are on and within forty miles of the line of the said road, as so definitely located.

"And, whereas, the Secretary of the Interior has, since the filing of said above described list, further directed that said list shall be rearranged so it shall indicate the specific loss in lieu of which each specific selection has been made. Now, therefore, to comply with the further requirements of the Interior Department, but not waiving or abandoning rights and claims heretofore acquired by virtue of its selection heretofore made under the direction of the Secretary of the Interior, the said Northern Pacific Railroad Company has herein designated the lands heretofore selected as indemnity in said Duluth, list No. 15, and no other lands, and as herein set opposite each specific description of the land lost from its grant in place, and in lieu of which said indemnity land is selected."

St. Paul, Minnesota, April 10, 1893.

CHAS. B. LAMBORN,
Land Commissioner, N. P. R. R. Co."

143 Duluth, Sept. 28, 1906.

Mr. Hoyt: I offer in evidence Exhibit "O", exemplified copy of the extract from the journal of the Senate of the United States, 54th Congress, st Session, April 8, 1896, on pages 228 and 229.

Also exemplified copy of Congressional Record of the Senate, 54th Congress, 2nd Session, July 23rd, 1897, page 1090.

Mr. Mason: Objected to as incompetent, irrelevant and immaterial.

Mr. Hoyt: I offer in evidence, Complainant's Exhibit "P", Annual Report of the Northern Pacific Railway Company to the

Railroad Commissioner of the State of Wisconsin, for the year ending June 30th, 1905, and refer to page 1, paragraph 1:

"Q. Name of Common Carrier making this report?
A. Northern Pacific Railway Company."

Paragraph 2:
"Q. Date of Organization?
A. Chartered by State of Wisconsin, March 15th, 1870, amended March 6, 1871 and April 15, 1895."

Paragraph 3:
"Q. Under laws of what government, state or territory organized? If more than one, name all, give reference to each statute, and all amendments thereof. A. Same above."
"Q. Original name?
A. Superior & St. Croix R. R. Co., changed in July, 1896, by Resolution of the Stockholders and Directors of the Northern Pacific Railway Company."

Paragraph 4:
"Q. If a consolidated Company, nome the constituent
144 Companies? Give reference to the charters of each, and all amendments of same?
A. Not a consolidated Company."

On page 2:
"Q. Name of Directors, Post Office address and date of expiration of terms?
A. George F. Baker, New York, October 1907; Robert Baker, New York, October 1907; William P. Clough, New York, October 1905; Alexander H. Cochran, New York, 1905, Howard Elliott, St. Paul, October, 1905; Amos French, New York, October, 1905; James M. Hill, New York, October, 1905; D. Willis James, New York, 1907; John S. Kennedy, New York, 1907; Louis D. Ledyard, New York, October 1906; Daniel S. Lamont, New York, October, 1906; George W. Perkins, New York, October, 1906; Charles Steele, New York, October, 1906; John Sloan, New York, October, 1907; Payne Whitney, New York, October, 1905."

On Page 12: Capital Stock:
"Capital Stock? Common. Number of shares authorized. $1,550,000.00; Par Value of shares: 100. Total par authorized, $155,000,000 Dividend, 7%, amounting to $10,850,000.00."

On page 14:
"Funded debt, mortgage bonds and miscellaneous obligations: Northern Pacific Railway Company, prior lien, 1897, due in 1997. One hundred and Thirty miles; amount outstanding $103,939,500.00. Rate, 4.

General Line, in 1897, due in 2047; amounting oustanding: 60 miles."

On page 18:
"Funded Debt. Recapitulation. Amount oustanding. $293,087,449.36."

On page 20:
Northern Pacific Railway Company $155,000,000.00. Funded debt: $185,475,849.36."

On page 26:
"In reference to the cost of the road and equipments: $291,148,670.16."

On page 26, memoranda:

145 "It is impossible to give cost by classification, inasmuch as property purchased at foreclosure, embraced nearly 31,000,000 acres of land, it would be manifestly misleading to figure cost per miles on the amount shown."

Duluth, Oct. 5, 1906.

Mr. Sanders:
We offer in evidence certified copies of certain proceedings had in the United States Circuit Court for the District of Minnesota, Third Division, in the suit entitled "The Farmer's Loan and Trust Company, complainant, vs. Northern Pacific Railroad Company, et al., defendants," as follows:

1. Decree dated May 27th, 1896, known as the Decree of Sequestration, marked "Defendant's Exhibit 1."

2. Certified copy of an order, dated May 5, 1899, known as the Original Order of Sale of lands, marked "Defendant's Exhibit 2."

3. An order dated June 5, 1899, known as the Amended Order of Sale of Lands, marked "Defendant's Exhibit 3."

4. The report of the Special Master, Alfred L. Carey, with reference to his sale of lands, known as the Special Master's Report of Sale, marked "Defendant's Exhibit 4."

5. Decree dated September 20, 1899, known as the Decree of Confirmation of Sale of Lands, marked "Defendant's Exhibit 5."

Mr. Hoyt:
Objected to as incompetent and immaterial.

Sydney Livesey, called as a witness on behalf of defendants, being first duly sworn testifies as follows:

146 Direct Examination.

By Mr. Sanders:

Q. What is your name? A. Sydney Livesey.
Q. What is your age? A. Twenty-six years.
Q. Where do you live? A. St. Paul, Minnesota.
Q. What is your occupation? A. Stenographer.
Q. In whose employ?
A. In the employ of the Northern Pacific.

Mr. Livesey, I hand you paper marked "Original Order of sale" and ask you, is this a true, full and correct copy of the original of that instrument, of that paper on file in the office of the United States Circuit Court, for the District of Minnesota, Third Division? A. It is.

Q. Did you compare this paper with the original on file in the Clerk's office? A. I did, sir.

Q. Mr. Livesey, I hand you two papers, one designated "Amended Order of Sale," the other "Report of Sale" and ask you if these are true, full and correct copies of the originals of said paper on file in the office of the Clerk of the United States Circuit Court, for the District of Minnesota, Third Division?

A. This paper "Report of Sale" is not a full copy of its. On page 4, we have left out counties prior to St. Louis County,
147 and after the record as to St. Louis County comes other counties of the State, which have been left out. Except as to those, this is a true, and correct copy of the original on file in the Circuit Court of the United States, the Third District of Minnesota.

Q. Then is it a true and correct copy so far as St. Louis County is concerned?

A. Yes, sir, it is. As to the "Amended Order of Sale," I can certify that that is a true and correct copy.

Cross Examination.

By Mr. Hoyt:

Q. Do those three copies have reference to one suit, the same suit? A. Yes, sir.

Q. What is the suit?

A. Farmer's Loan and Trust Company vs. Northern Pacific Railroad Company, Phillip B. Winston—

Q. And others? A. Yes, sir.

Q. And all three have reference to the same?

A. Yes, sir, all between the same parties.

Mr. Sanders: Q. Mr. Livesey, in the Master's Report of the sale of the land, reference is had to a schedule recommending said report, have you seen the original schedules on file in

the office of the Clerk of the United States Circuit Court, District of Minnesota, Third Division? A. I have.

Q. I hand you a book marked "Schedule of Lands of the Northern Pacific Railroad Company in the State of Minnesota, to be sold as advertised, at the court houses in the counties in which said lands are situate, under the Decree of the
148 United States Circuit Court for the Eastern District of Wisconsin, dated May 25th, 1899, have you compared this book with the original schedule on file with said clerk, and, if so, to what extent?

A. I have compared this schedule with the one on file in the United States Circuit Court, District of Minnesota, Third Division, as to schedule A-2 of the list of patented and selected lands of the Northern Pacific Railroad Company in the State of Minnesota, County of St. Louis.

Q. Did you examine it specially with reference to the Southwest quarter of the southeast quarter of section 7, township 54, north of range 14 west, the land here in controversy?

A. Yes, sir.

Q. Is this book which you have in your hand, a true and correct copy of the original on file with the Clerk of the United States Circuit Court in so far as it relates to land last described? A. Yes, sir.

Q. To the best of your knowledge and belief is the whole book an exact duplicate of the original on file in the clerk's office?

A. Yes, because the print and the form of setting it up, and any notes found herein are also found in that same copy.

Mr. Sanders: We offer in evidence a certified copy of the schedule which accompanied the Special Master's Report of Sale, which report was filed August 26, 1899, and which schedule was marked "Schedule of Lands of the Northern Pacific Railroad Company in the State of Minnesota, to be sold as advertised at the court houses of the counties in which the lands were situated," marked and offered as defendant's Exhibit "6."

149 Cross Examination.

By Mr. Hoyt:

Q. What is your position with the Northern Pacific Railroad Company? A. I am a stenographer.

Q. How long have you occupied that position?

A. In the Department that I am now since April 18 of this year.

Q. Well, in any department there as stenographer; did you commence as a stenographer the 18th of September this year? A. No, sir.

Q. How long have you been a stenographer there?

A. I began work for the Northern Pacific on the 18th of November, 1903.

Q. 1903? A. Yes, sir, and worked—

Q. What is the date of that report? A. This schedule?

Q. Yes. A. This is May 25th, 1899.

Q. Well, then you don't know anything about that except as you found it in the office, do you? A. Yes, sir.

Q. What do you know about it?

A. I know that I compared it with the schedule—

Q. No, no, no; I am speaking—before you did this work here. I am not asking you about your comparing it, I am asking you—until you were employed in the office in 1903, you didn't know anything about that book, do you?

A. No, sir, I did not.

Q. And you don't know anything about it, except as you have found it in the office and compared it with the original papers in the United States Court, is that it?

A. No answer.

Q. Do you understand the question?

A. I don't see just what you are trying to get at, Judge.

Q. All the knowledge that you have of that book as
150 its being a correct and true copy is because you found it in the office of the Northern Pacific Railway Company, and then you took and compared it with the copy in the United States Circuit Court in the case, same case, is that all? A. Yes, sir, that is all.

Q. So you don't know—Do you know the man who made that report? A. No, sir, I do not.

Q. Nor when it was made, except by the date?

A. That's all.

Object to it as incompetent and immaterial, and not properly identified.

Mr. Sanders: We offer in evidence Exhibit "7", certified copy of a deed, dated September 22, 1899, from Alfred L. Carey, Special Master, and Edwin H. McHenry, and Frank G. Bigelow, as Receivers of the Northern Pacific Railroad Company, to the Northern Pacific Railway Company, embracing the land involved in this suit.

Mr. Hoyt: Objected to as incompetent and immaterial and no description given in the deed.

Mr. Sanders: We offer in evidence a certified copy of a deed, dated December 21st, 1899, from the Northern Pacific Railroad Company to the Northern Pacific Railway Company, involving the land here in suit, which deed is recorded in St.

Louis County, Minnesota, in Book 188 of deeds, page 568, marked Defendant's Exhibit "8."

151 Mr. Hoyt: Object to the introduction of the deed in evidence as being incompetent and immaterial, and that the Northern Pacific Railroad Company has no authority to execute and convey any land, and that there is no land described in the deed which is conveyed.

Mr. Sanders: We offer in evidence a Warranty Deed, dated January, 1900, from the Northern Pacific Railway Company to Frederick Weyerhaeuser and John A. Humbird, conveying the land in controversy, with other lands, in consideration of the sum of $173,044.70, marked Defendant's Exhibit 9."

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the land in controversy, to-wit: The Southeast Quarter of Section 21, Township 54 North of Range 12 West, was patented to the Northern Pacific Railway Company on November 13th, 1905.

It is stipulated between the parties hereto that complainant's Exhibit "D", attached to the bill of complaint contains true copies of the act to incorporate the Superior & St. Croix Railroad Company and of certain acts amendatory thereto, and of the record of certain proceedings taken to change the name of the Superior & St. Croix Railroad Company to the Northern Pacific Railway Company, and that an authenticated certified copy thereof was filed in the office of the Secretary of State for the State of Minnesota, and in the office of the

152 Register of Deeds of Ramsey County, Minnesota, and that thereafter and on the 13th day of July, 1896, said Railway Company duly appointed Edwin W. Winter as its agent and impowered him and authorized him to accept service of summons in any civil action in which said corporation may be a party, which said appointment was duly filed in the office of the Secretary of State, State of Minnesota, in the office of the Register of Deeds of Ramsey County of the State of Minnesota, and that on the 23rd day of July, 1896, the Northern Pacific Railway Company duly paid the State Treasurer the State tax, in accordance with the act approved April 24th, 1899, on its original capital stock.

Duluth, Nov. 27, 1906.

Documentary Evidence.

Mr. Sanders: We offer in evidence Defendant's Exhibit "10" being certain instructions issued by the Department of

the Interior under the Act of Congress approved July 1, 1898.

We offer in evidence Defendants' Exhibit "11", being a copy of Northern Pacific Railroad Company's Selection List No. 15 filed in the United States Land Office at Duluth, Minn. on October 17, 1883.

We offer in evidence Defendants' Exhibit "12", being Northern Pacific Railroad Company's Selection List known as Rearranged List No. 15-B, filed in the United States
153 Land Office at Duluth, Minn., April 11, 1893, in so far as said List relates to the lands here in controversy.

We offer in evidence as Defendant's Exhibit "13", copy of the Act of Congress approved April 28, 1904, entitled "An Act Validating certain conveyances of the Northern Pacific Railroad Company and the Northern Pacific Railway Company."

We offer in evidence as Defendant's Exhibit "14" copy of an Act of Congress approved May 17, 1906, entitled "An Act for the Relief of Certain Entrymen and Settlers within the limits of the Northern Pacific Railway Land Grant."

Mr. Hoyt:
Objected to as incompetent, irrelevant and immaterial as to both the above Acts of Congress.

It is stipulated that the above copies are true and correct copies of the original statutes.

In offering documentary evidence in this case certain certified copies were offered in evidence, which certified copies were, by consent of the parties, afterwards withdrawn, and copies of the same were substituted in their place.

It is hereby stipulated and agreed by and between the parties hereto that the copies now in evidence as Exhibits shall be received in lieu of the certified copies originally offered in evidence.

154 Complainant's Exhibits.

Complainant's Exhibit F.

District Court. Eleventh Judicial District.

United States of America,
State of Minnesota,
County of St. Louis—ss.

September General Term, 1890.

In the matter of the application of Chas. D. Campbell to be-

come a citizen of the United States Dan Campbell and Alexander Steele being severally duly sworn, do depose and say, each for himself, that he is a resident of the United States, that he is well acquainted with the above named Chas. D. Campbell, that he has resided within the limits and under the jurisdiction of the United States for the five years last past, and for one year last past within the state of Minnesota; and that during the same period he has behaved himself as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same.

DAN CAMPBELL.

[District Court Seal] ALEXANDER STEELE.

155 Subscribed and sworn to in open Court, this 30th day of Oct. 1890.

A. L. BLOOMER,
Deputy Clerk.

District Court, Eleventh Judicial District.

State of Minnesota,
County of St Louis—ss.

I, Chas. D. Campbell do swear that I will support the Constitution of the United States of America, and that I do absolutely and entirely Renounce and Abjure Forever, all Allegiance to every Foreign Power, Prince, Potentate, State or Sovereignty, whatever; and particularly to the Queen of Great Britian whose subject I was. And further, that I have never borne any hereditary title, or been of any of the degrees of Nobility of the country whereof I have been a subject, and that I have resided within the United States for five years last past, and in this State for one year last past.

CHAS. D. CAMPBELL.

Subscribed and sworn to in open Court this 30th day of Oct. 1890.
[District Court Seal]

A. L. BLOOMER,
Deputy Clerk.

District Court. Eleventh Judicial District.

State of Minnesota,
County of St. Louis—ss.

And now, to-wit, At the term of said Court, now being held at Duluth, in and for the County of Saint Louis, in said State, upon the foregoing oath and affidavits, and upon further proof having been made by the production of a certificate, that the

said Chas. D. Campbell did before the clerk of this Court, Oct. 23, 1880. The same being a Court of Record, having
156 common law jurisdiction make the requisite declaration of his intention to become a citizen of the United States, and to renounce all other allegiances, as required by the laws of the United States:

It is ordered by the Court, That the said Chas. D. Campbell be, and is hereby admitted to be, a citizen of the United States.

By the Court: T. H. PRESSNELL, Clerk.

A true Record. Attest: A. L. Bloomer, Deputy Clerk.

United States of America,
State of Minnesota,
County of St. Louis—ss.

I, J. P. Johnson Clerk of the District Court of the Eleventh Judicial District for the State of Minnesota, do hereby certify that the foregoing is the copy of a record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said District Court this 4th day of June, 1906.

[District Court Seal] J. P. JOHNSON, Clerk.
By Alex. S. Hamilton, Deputy.

Endorsed: Complainant's Exhibit F. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

157 Complainant's Exhibit "G."

"F" S. S. M.

Department of the Interior,

General Land Office.

F. C. L.

Washington, D. C., May 19, 1906.

I hereby certify that the annexed copy is a true and literal exemplification of the original on file in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal U. S. Land Office] W. A. RICHARDS,
Commissioner of the General Land Office.

Ex'd.
C. M. B.
J. F. S.

Department of the Interior,

General Land Office.

Nov. 7, 1905.

Whereas, by the Act of Congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound on the Pacific Coast, by the Northern Route," and the Joint Resolution of May 31, 1870, there was granted to the Northern Pacific Railroad Company, its successors and assigns for the purpose of aiding in the construction of said railroad and telegraph line, and branch to the Pacific Coast, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt
158 through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through the state, and whenever on the line thereof, the United States have full title not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office"; and

Whereas, it is further provided that "whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said Company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections; and

Whereas, by said Joint Resolution of May 31, 1870, it is further provided that in the event of there not being in any State or Territory, in which said main line or branch may be located at the time of the final location thereof, the amount of lands per mile granted by Congress to said company within the limits prescribed by its charter, then said company shall be entitled, under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency on said main line, or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed

of subsequent to the passage of the Act of July two,
159 eighteen hundred and sixty-four; and

Whereas, official statements from the Secretary of the Interior have been filed in the General Land Office, showing that the Commissioners appointed by the President under the provisions of the fourth section of the first named act have reported to him that the said Northern Pacific Railroad and Telegraph Line, and Branch, excepting that portion between Wallula, Washington, and Portland, Oregon, declared forfeited by the Act of September 29, 1890, have been constructed and fully completed and equipped in the manner prescribed by the Act relative thereto, and the same accepted; and

Whereas, there has been filed in the office of the Secretary of the Interior, evidence showing that the Northern Pacific Railway Company is the lawful successor in interest of the Northern Pacific Railroad Company, as to all lands within the limits of the grant made to the said Northern Pacific Railroad Company by the Act of July 2, 1864, and all subsequent legislation; and

Whereas a certain tract of land has been selected under the Acts aforesaid by the duly authorized agent of said Northern Pacific Railroad Company, now Northern Pacific Railway Company, as shown by his original list approved by the local land officers and now on file in the General Land Offices; and

Whereas said tract of land lies coterminous to the constructed line of road and is particularly described as
160 follows, to-wit:

North of Base Line and West of Fourth Principal Meridian, Minn. Northern Pacific Railway List.

Parts of Section	Section	Town	Range	Acres	Parts of Section	Section	Town	Range	Acres
List #15, approved by R. & R., Duluth, Minn., Oct. 17, 1883									
			N	W	In lieu of				
S.E. 1/4	21	54	12	160.00	S.E. 1/4	19	133	34	160.00

Railroad Division, Oct. 31, 1905.

We hereby certify that we have examined the foregoing list in connection with the plats and records of this office and have found the tract therein described is vacant unappropriated land, outside of the thirty (30) mile and within the forty (40) mile limits of the grant made to aid in the construction of the Northern Pacific Railroad, now Northern Pacific Railway, and subject to selection; that the tract designated as basis for said

selection was disposed of, or otherwise appropriated by the United States, subsequent to the date of the granting act, and prior to the definite location of the road, and has not been used as a basis for other approved selections.

W. J. DRUMMOND,
W. K. MENDENHALL,
Examiners.

Approved: S. S. Marr, Chief of Division.

Mineral Division, November 1, 1905.

This certifies that under Sec. 2345, U. S. Rec. Stats., the U. S. Mining laws are not applicable to public lands in the State of Minnesota, and that this selection was made prior to the Saline Act of January 31, 1901.

C. A. HOLLINGSWORTH, Examiner.

Approved: H. G. Potter, Chief of Division.

161 General Land Office, Division of Swamp Lands.

Washington, D. C., November 2, 1905.

This certifies that the foregoing list, List No. 58, Northern Pacific Railway Lands, embracing 160 acres has been carefully examined in connection with the swamp land records of this office, and that the same has been found to be free from conflict.

R. C. LEVY, Examiner.

Approved:
Edmond Mallet, Chief of Division.

General Land Office, Accounts Division.

November 2nd, 1905.

Expense of survey and office work on lands described in the foregoing list.

Railroad Selections, 160.00 acres.

Field work	$5.21
Office work at .0075 per acre	.80
	$6.01

JAS. D. MANKIN,
Asst. Chief of Division.

Now, therefore, as it has been found on a careful examination in connection with the authenticated map on file in the General Land Office, of the survey of the Northern Pacific Railroad route that the foregoing land falls within the forty mile lateral

limits of said route and that the said land, so far as the returns to the General Land Office show, is free from conflict, it is hereby recommended that the described tract,
162 covering one hundred and sixty acres be approved and carried into patent, as land falling within the grant by the Acts aforesaid, and inuring to the said Northern Pacific Railway Company, as successor in interest to the Northern Pacific Railroad Company.

J. H. FIMPLE,
Acting Commissioner,
S. S. M.

To the Honorable,
The Secretary of the Interior.
J. I. P.

Department of the Interior,

Washington, D. C., November 10, 1905.

Approved: covering one hundred and sixty acres.

E. A. HITCHCOCK,
Secretary of the Interior.

Endorsed: Complainant's Exhibit "G." Filed Dec. 1st, 1906. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

163 Complainant's Exhibit H.

(Copy)

54th Congress.
1st Session. S. R. 124.

In the Senate of the United States.

April 8, 1896.

Mr. Mitchell, of Oregon, introduced the following joint resolution, which was read twice and referred to the Committee on the Judiciary.

Joint Resolution.

To facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person, or association of persons owning, operating, or controlling a parallel or competing railroad.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the pur-

chasers of the railroad property of the Northern Pacific Railroad Company, which may at any time hereafter be sold at judicial sale in any suit or suits for the foreclosure of any of the mortgages heretofore executed by said company thereon, may
organize anew by filing in the office of the Secretary
164 of the Interior a copy of the deed or deeds conveying
said railroad and property with a certificate, signed by a majority of them, setting forth the name adopted by them, the names, number and residences, respectively, of its directors and a copy of any plan of reorganization adopted by said purchasers or pursuant to which such purchase shall have been made. Upon filing such certificate such purchasers, their associates, successors and assigns shall, by the name specified in said certificate, have and be invested with all the estate, right, title and interest of said purchasers in and to such railroad and property, and shall possess franchises, rights and powers the same as the Northern Pacific Railroad Company, and shall be subject to all the obligations and duties imposed by Congress upon said Company, and may acquire and hold any property and branches of the Northern Pacific Railroad Company; and it may acquire and construct additional branches or feeders in any State as authorized by the laws thereof; and upon such terms and conditions as may be provided in the plan of reorganization filed aforesaid it may from time to time issue such bonds, secured by mortgage upon its property and franchises or otherwise, not exceeding in the aggregate the sum of one hundred and ninety million dollars, and twenty-five thousand dollars additional per mile for railroad hereafter constructed, and such stocks, preferred or common, as shall have been authorized by such plan: Provided,
that except as such stock shall have been
165 issued for property acquired under such plan,
no additional stock shall be issued, except for money, labor, or property estimated at its actual cash value, to the par or face value of the stock, and that any such mortgage shall be filed and recorded in the office of the Secretary of the Interior as sufficient proof and notice of its legal execution and effectual delivery and of the lien thereby created: Provided, that such successor company, its successors and assigns, shall sell to any applicant therefor for purposes of actual settlement and cultivation in tracts of not less than forty nor more than one hundred and sixty acres each at a price not exceeding two dollars and fifty cents per acre, any agricultural land, lying more than one mile from said railroad and then unsold, heretofore granted by Congress to the Northern Pacific Railroad Company and acquired by purchasers as aforesaid,

but this proviso shall not apply to lands chiefly valuable for timber, coal, iron, or stone; and said company may reserve to itself, its successors and assigns, in the sale of any lands applied for hereunder, merchantable timber and stone not needed for building and fencing thereon, and all coal and iron which may be found therein, and the right to take therefrom gravel for its own uses; provided, however, that said company shall have the right to reserve from sale hereunder and to otherwise dispose of such tracts or bodies of arid lands as it shall deem necessary or advisable for use in any way in promoting and developing irrigation, through companies or associations organized under and subject to the laws of the States
166 in which such lands are situated; and provided further, that neither the Northern Pacific Railroad Company nor such successor corporation, its successors or assigns, shall consolidate its stock with or sell, convey, or lease said railway, or by other corporate action give control or management over and of the same, to any corporation, company, person, or association of persons owning, operating or controlling a parallel and competing line of railway; and any contract entered into by said successor company in violation of the provisions hereof shall be null and void, and may be enjoined at the suit of the United States or any state in which said road or any part thereof is situate in any court of competent jurisdiction; And provided also, that nothing herein contained shall be construed as making any additional grant of lands to such successor corporation or as a waiver of any right of the United States now existing to enforce any forfeiture of lands heretofore granted to the said Northern Pacific Railroad Company or as in any manner affecting the vested rights of any settler or settlers on any of the lands heretofore granted to the Northern Pacific Railroad Company or of any purchaser or purchasers of any such lands from said company.

Endorsed on back: 54th Congress, 1st Session. S. R. 124.
Joint resolution to facilitate the reorganization of the
167 Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person, or association of persons owning, operating or controlling a parallel or competing railroad.

By Mr. Mitchell, of Oregon:

April 8, 1896. Read twice and referred to the Committee on the Judiciary.

(Copy.)

(Calendar No., 821.)

54th Congress, S. R. 124

1st Session. (Report No. 776.)

In the Senate of the United States.

April 8, 1896.

Mr. Mitchell, of Oregon, introduced the following joint resolution: which was read twice and referred to the Committee on the Judiciary.

April 21, 1896.

Reported by Mr. Mitchell, of Oregon, with amendments, viz: Omit the parts struck through and insert the parts printed in italics.

Joint Resolution.

To facilitate the re-organization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding two dollars and fifty
168 cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person, or association of persons, owning, operating, or controlling a parallel or competing railroad.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the purchasers of the railroad property of the Northern Pacific Railroad Company, which may at any time hereafter be sold at a judicial sale in any suit or suits for the foreclosure of any of the mortgages heretofore executed by said company thereon, may organize anew by filing in the office of the Secretary of the Interior a copy of the deed or deeds conveying said railroad and property with a certificate, signed by a majority of them setting forth the name adopted by them, the names, number, and residences, respectively; of its directors, and a copy of any plan of re-organization adopted by said purchasers or pursuant to which such purchase shall have been made. Upon filing such certificate such purchasers, their associates, successors, and assigns shall, by the name specified in said certificate, have and be invested with all the estate, right, title and interest of said purchasers in and to such railroad and property, and shall possess franchises, rights, and powers the same as the Northern Pacific Railroad Company, and shall be subject to all the obligations and duties imposed by Congress
169 upon said company, and may acquire and hold any property and branches of the Northern Pacific Rail-

road Company; and it may acquire and construct additional branches or feeders in any state as authorized by the laws thereof; and ~~upon such terms and conditions as may be provided in the plan of reorganization filed aforesaid thereof; and~~ it may from time to time issue ~~such~~ bonds, secured by mortgage upon its property and franchises or otherwise, not exceeding in the aggregate the sum of one hundred and ninety million dollars, and twenty-five thousand dollars additional per mile for railroad hereafter constructed, the interest on any of which bonds shall not exceed four per centum per annum, and ~~such~~ stocks, preferred or common, ~~as shall have been authorized by such plan~~ not exceeding in the aggregate one hundred and fifty-five million dollars, of which amount not exceeding seventy-five million dollars may be preferred, but the preference of the preferred stock as to dividends shall not exceed four per centum per annum: Provided, That except ~~as~~ such stock as shall ~~have been~~ be issued for property acquired under such ~~plan~~ foreclosure proceedings, no additional stock shall be issued except for money, labor, or property ~~estimated~~ at its actual cash value, to the par or face value of the stock, which may be common stock or preferred stock, or both, as may be authorized at stockholders' meetings, and that any such mortgage shall be filed and recorded in the office of the Secretary of the Interior as sufficient proof and notice of its legal execution and
170 effectual delivery and of the lien thereby created; Provided, that such successor company, its successors and assigns, shall sell to any applicant therefor for purposes of actual settlement and cultivation in tracts of not less than forty nor more than one hundred and sixty acres each at a price not exceeding two dollars and fifty cents per acre, any agricultural land, lying more than one mile from said railroad and then unsold, heretofore granted by Congress to the Northern Pacific Railroad Company and acquired by purchasers as aforesaid, but, this proviso shall not apply to lands chiefly valuable for timber, coal, iron, or stone; and said company may reserve to itself, its successors and assigns, in the sale of any lands applied for hereunder, merchantable timber and stone not needed for building and fencing thereon, and all coal and iron which may be found therein, and the right to take therefrom gravel for its own uses: Provided, however, that said company shall have the right to reserve from sale hereunder and to otherwise dispose of such tracts or bodies of arid lands as it shall deem necessary or advisable for use in any way in promoting and developing irrigation, through companies or associations organized under and subject to the laws of the States, in which such lands are situated: And provided further, that neither

the Northern Pacific Railroad Company nor such successor corporation, its successors or assigns, shall consolidate its stock, or the stock at any time by it held in any subsidary corporation, with, or sell, convey, or lease said railway, or by other corporate action give control or management over and of the same, to any corporation, company, person, or association of persons ~~owning, operating, or controlling a parallel and competing line of railway~~ whatever without the consent of Congress; and any contract entered into by said successor company in violation of the provision hereof shall be null and void, and may be enjoined at the suit of the United States or any State in which said road or any part thereof is situate in any court of competent jurisdiction: And provided also that nothing herein contained shall be construed as making any additional grant of lands to such successor corporation or as a waiver of any right of the United States now existing to enforce any forfeiture of lands heretofore granted to the said Northern Pacific Railroad Company or as in any manner affecting the vested rights of any settler or settlers on any of the lands heretofore granted to the Northern Pacific Railroad Company or of any purchaser or purchasers of any such lands from said company.

171

Sec. 2. That Congress shall at all times have the power to alter, amend or repeal this solution.

(Endorsed on back.) S. R. 124.

54th Congress
1st Session.

(Calender No. 821.)

(Report No. 776)

Joint Resolution.

To facilitate the reorganization of the Northern Pacific Railroad Company, to secure to actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person, or association of persons owning, operating, or controlling a paralled or competing railroad.

172

By Mr. Mitchell, of Oregon.

April 8, 1896. Read twice and referred to the Committee on the Judiciary.

April 21, 1896. Reported with amendants.

54th Congress, S. R. 124.
1st Session.

In the Senate of the United States.

May 16, 1896.

Ordered to be Printed.

Amendment.

Intended to be proposed by Mr. Jones, of Arkansas, to the joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands
173 within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person, or association of persons owning, operating, or controlling a parallel or competing railroad, viz: At the end of the resolution insert the following:

Provided further, That the said purchasers of the railroad property of the Northern Pacific Railroad Company shall not acquire and hold any property within the Yellowstone National Park on any bond or security of any corporation or company doing business therein. It may, however, make traffic agreement concerning the transportation of persons or property to and from said park: And provided further, That said purchasers shall carry out all existing traffic and operating agreements of the Northern Pacific Railroad Company and its receivers, and all decrees and orders made by the Federal Courts in the receivership of said road.

Endorsed on back: S. R. 124.
54th Congress.
1st Session.

Amendment.

Intended to be proposed by Mr. Jones, of Arkansas, to the joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company; to secure to
174 actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company, or any successor company from giving by consolidation, sale or other corporate action control of its railroad to any corporation, company, person or association of persons owning, operating, or controlling a parallel or competing railroad.

May 16, 1896.—Ordered to be printed.

54th Congress. S. R. 124.
1st Session.

In the Senate of the United States.

May 25, 1896.

Ordered to be printed.

Amendment.

Intended to be proposed by Mr. Jones, of Arkansas, to the joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase, at a price not exceeding two dollars and fifty cents per acre, the agricultural lands within its grant, and to prohibit said company or any successor company from giving, by consolidation, sale, or other
175 corporate action, control of its railroad to any corporation, company, person, or association of persons, owning, operating, or controlling a parallel or competing railroad, viz: At the end of the resolution insert the following:

Provided further, That said purchasers of the railroad property of the Northern Pacific Railroad Company shall not acquire and hold any property within the Yellowstone National Park, or any stock, bond, or security of any corporation or company doing business therein. It may, however, make traffic agreements concerning the transportation of persons or property to and from said park: And provided further, That said purchasers shall carry out all existing traffic and operating agreements of the Northern Pacific Railroad Company and its receivers, and all decrees and orders made by the Federal courts in the receivership of said road.

Endorsed on back: S. R. 124.

54th Congress.
1st Session.

Amendment

Intended to be proposed by Mr. Jones of Arkansas, to the joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase, at a price not exceeding two dollars and fifty cents per acre, the agricultural lands within its grant, and to prohibit said company or any successor company from giving, by consolidation, sale, or other corporate action, control of its railroad to any corporation, com-
176 pany, person, or association of persons, owning, operating, or controlling a parallel or competing railroad.

May 25, 1896—Ordered to be printed.

54th Congress,
1st Session. S. R. 124.

In the Senate of the United States.

June 5, 1896.

Referred to the Committee on the Judiciary and ordered to be Printed.

June 5, 1896.

Reported Favorable by Mr. Michell, of Oregon.

Amendment.

Intended to be proposed by Mr. Michell, of Oregon, to the joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person, or association of persons, owning, operating, or controlling a parallel or competing railroad, viz: Add to the end of the first section the following:

177 And provided further, That in every case of failure of the title to any lands heretofore conveyed or contracted to be sold by said Northern Pacific Railroad Company, any and all rights of such purchaser or his assigns in respect to such land, or in respect of the failure of such title, or in respect of the liability of said Northern Pacific Raidroad Company on said contracts for the sale of lands, and all judgments heretofore or hereafter rendered against said Northern Pacific Railroad Company or against any of the receivers thereof in any court of the United States or in any State court, on account of any such failure of title, or on any covenants of warranty, or on account of any injury to any person or property, shall survive and may be enforced against such successor company with the same force and effect and in the same manner as against the Northern Pacific Railroad Company; and all debts and liabilities which said Northern Pacific Railroad Company or the receivers thereof may have incurred on account of injuries to person and property, and on any covenants of warranty in any contract or deed for the conveyance of lands, shall, when final judgment thereon has been or may hereafter be obtained, be paid by such re-organized company and may be enforced by execution or other proper final process directly against such re-organized company and its property and shall be a prior lien thereon; and this act is upon condition that such successor company shall within thirty days from the

178 passage of this Act file in the office of the Secretary of the Interior its assent thereto and all the provisions

thereof, and on failure to do so this Act shall become ipso facto null and void.

54th Congress,
1st Session. S. R. 124.

In the Senate of the United States.

June 5 1896.

Referred to the Committee on the Judiciary and ordered to be printed.

Amendment.

Intended to be proposed by Mr. Nelson to the joint resolution (S. R. 1124) to facilitate the re-organization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving, by consolidation, sale, or other corporate action, control of its railroad to any corporation, company, person or association of persons, owning, operating or controlling a parallel of competing railroad, viz.: At the end of the resolution insert the following:

And povided further, That such successor company, its successors and assigns, shall succeed to all the rights and be subject to all the liabilities created by any and all contracts for the sale of lands heretofore granted by Congress to
179 the Northern Pacific Railroad Company, which said railroad Company or its receiver or receivers have made or shall make prior to the acquisition of said lands by said successor company.

54th Congress,
1st Session. S. R. 124.

In the Senate of the United States.

June 6, 1896.

Ordered to be printed.

Amendment.

Intended to be poposed by Mr. Smith to the joint resolution (S. R. 124) to facilitate the re-organization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action, control of its railroad to any corporation, company, person or association

of persons owning, operating or controlling a parallel or competing railroad, viz.: On page 2 in line 23, after the word "plan," insert the following:

Provided, however, That in consideration of the provisions of this resolution, the said organization by this resolution contemplated shall take up all the bonds of the Seattle,
180 Lake Shore and Eastern Railway Company which were in any wise or any time guaranteed by the Northern Pacific Railroad Company, and in exchange therefor issue an equal value of first-mortgage bonds of the new company by this resolution authorized as aforesaid.

I, Charles G. Bennett, Secretary of the United States Senate, do hereby certify that the foregoing typewritten sheets numbered consecutively 1 to 13 inclusive, are true and accurate copies of the printed originals thereof in the files of this Office.

Given under my hand and the seal of the Senate of the United States this second day of June, A. D., nineteen hundred and six.

[Seal] CHARLES G. BENNETT, Secretary.

Endorsed: Complainant's Exhibit H. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

181 Complainant's Exhibit K.

Northern Pacific Railway Company,

Board of Directors.

July 13, 1898.

"Resolved: That the Northern Pacific Railway Company hereby accepts the provisions of the Sundry Civil Appropriation Bill, approved by the President of the United States July 1, 1898, concerning the land grant of the Northern Pacific Railroad Company; and that the Vice-President of this company be, and hereby is, authorized to communicate to the Secretary of the Interior such acceptance by this company, of the provisions of the Sundry Civil Appropriation Bill."

I, George H. Earl, Secretary of the Northern Pacific Railway Company hereby certifies that the foregoing is a true copy of a resolution adopted by the Board of Directors of said Company at their meeting held on the 13th day of July, 1898.

Witness my hand and the seal of said company this 21st day of July, 1898.

GEO. H. EARL, Secretary.

Endorsed on back: 2972. Dep't of the Interior, Received Jul. 22, 1898. L. & R. R. Div. 1898—74045.

182 Northern Pacific Railway Company,

Office of the Vice-President. New York.
35 Wall Street,

July 21, 1898.

Sir:

I beg to enclose herewith a certified copy of a resolution adopted by the Board of Directors of the Northern Pacific Railway Company, formally accepting on the part of this company the provisions of the Sundry Civil Appropriation Act, approved July 1st, 1898, having reference to the land grant of this company.

Very respectfully,

DANIEL S. LAMONT,
Vice-President.

The Secretary of the Interior,
Washington, D. C.
(Inclosure)

Endorsed on back: J.I. P. A. M. Dept. of the Interior, July 23, '98, acknowledged and respectfully referred to the Com'r. Gen'l. Office.

EDWARD M. DAWSON,
Chief Clerk.

No answer required. Filed with Nor. Pac. R. R. Papers Marr.

U. S. General Land Office, Received Jul. 22, 1898-74045.

Department of the Interior, Received, Jul. 22, 1898-2972.

Daniel S. Lamont,
Vice-President No. Pac. Ry. Co.

183 July 21/98.

Encloses certified copy of resolution adopted by the Board of Directors, No. Pac. Ry. Co., formally accepting on the part of said company, provisions of Sundry Civil Appropriation Act, Approved July 1, 1898, having reference to land grant of N. P. Ry Co.

Chief Clerk,
Jul. 22, 1898, Department of the Interior.

F 43/142
1 E

S. S. M.

4-207

S. S. M.
F

Department of the Interior,
General Land Office,
Washington, D. C., May 19, 1906.

I hereby certify that the annexed copies relating to the ac-

ceptance by the Northern Pacific Railway Company of the provision of the act of July 1, 1898, are true and literal exemplification from the original and the certified copy on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[Seal] W. A. RICHARDS,
Commissioner of the General Land Office.

184 Endorsed: Complainant's Exhibit K. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, By E. Catherine Neff, Deputy Clerk.

185 Complainant's Exhibit L.

Introduced in evidence at page 138 of this Record.

F. S. S. M.

S. S. M. 4-207

Department of the Interior.
General Land Office.

Washington, D. C., May 19, 1906.

I hereby certify that the annexed copy is a true and literal exemplification from the original on file in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[Seal] W. A. RICHARDS,
Commissioner of the General Land office.

Northern Pacific Railroad Company,

(President's Office.)

New York, July 3rd, 1882.

Hon. H. M. Teller,
Secretary of the Interior,
Washington, D. C.

Sir: I have the honor to inform you that I have to-day
186 sent to your address by express, the map or plat of the definite location of the Main Line of the Northern Pacific Railroad from a point on the main line of said Railroad at [is] junction with the St. Paul & Duluth Railroad near the right bank of the St. Louis river in the State of Minnesota thence in an easterly direction to a point in Section 15, Township 47 North, Range 2 West of the 4th Principal Meridian in the State of Wisconsin, lying and being partly in the State of Minnesota, and partly in the State of Wisconsin.

The map is duly verified by the Chief Engineer and certified by me as the President of the Company, and I respectfully request that it be transmitted to the Hon. the Commissioner of the General Land Office for filing in his office and for such necessary and appropriate action thereon as shall be in compliance with law and the practice of the Department.

I beg leave to refer to Section 3 of the Act of Congress, approved July 2, 1864, commonly known as the Charter of the Northern Pacific Railroad Company.

I have the honor to be,

Very respectfully,
Your Obedt. Servant,

H. WILLARD, President.

Endorsed on back:

Department of the Interior,
General Land Office.

Rec'd July 6, 1882.

2090 L. & R. R. Div. 53115
M.

H. Willard, President, New York City, 3rd July, 1882.
187 Transmits map of definite location of Nor. Pac. R. R. partly in Minn. & partly in Wisconsin from junction with St. Paul & Duluth in Minn. to a point in Wisconsin.

F. 1 paper and map, Enc., 1 paper and map.

Z. B. S.

Dept. of the Interior,

5 July, 1882.

Respectfully Referred to the Com'sr Gen'l Land Office.

GEO. M. LOCKWOOD,
Chief Clerk.

Endorsed. Complainant's Exhibit L. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

Complainant's Exhibit M.

188 F.

Calendar No. 821.

54th Congress, 1st Session. Report No. 776.

In the Senate of the United States.

April 21, 1896. Ordered to be printed.

Mr. Mitchell, of Oregon, from the Committee on the Judiciary, submitted the following:

Report.

(To accompany S. R. 124.)

The committee on the judiciary, to whom was referred the joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railway Company; to secure to actual settlers the right to purchase at a price not exceeding $2.50 per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation sale, or other corporate action control of its railroad to any corporation, company, person or association or persons owning, operating or controlling a parallel or competing railroad, having had the same under consideration, beg to submit the following report.

189 The purpose of this proposed legislation may be stated in a few words. It has been made to appear to your committee that the land grant and other property of the Northern Pacific Railroad Company, all of which is covered by mortgage liens, will at a very early date be sold under foreclosure proceedings. This joint resolution, should it become a law, will enable the purchasers at such foreclosure sale, upon filing in the office of the Secretary of the Interior a copy of the deed or deeds conveying to them said railroad and property, together with a certificate signed by a majority of them, setting forth the name adopted by them, the names, number and residence, respectively of the directors of the proposed new company, and a copy of any plan of reorganization adopted by said purchasers, or pursuant to which such purchase shall have been made, to reorganize under the name specified in such certificate, so that they, their associates, successors and assigns shall have and be invested with all the estate, right, title and interest of such purchasers in and to such railroad and property, and shall possess franchises, rights, and powers the same as the Northern Pacific Railroad Company now possesses; such new company to be subject to all the obligations and duties imposed by Congress upon the Northern Pacific Railroad Company. Such new company is authorized to acquire and hold any property and branches of the Northern Pacific Railroad Company.

It may also acquire and construct additional branches or feeders in any State, in the manner authorized by the laws of such State, and may issue bonds secured by mortgage upon its property, franchises, and otherwise, not exceeding in
190 the aggregate the sum of 190,000,000 and $25,000 additional per mile for railroad hereafter constructed.

This limit of bonds, not including those authorized on newly constructed road, is some $18,000,000 less in amount than the bonds now outstanding of the Northern Pacific.

A limit is also placed upon the amount of stock to be issued by the new company. The aggregate shall not exceed $155,000,000, of which amount not exceeding $75,000,000 may be preferred, but the preference of the preferred stock shall not exceed 4 per centum per annum. Furthermore, such stock shall only be issued for property acquired under such foreclosure proceedings; no additional stock to be issued, except for money, labor, or property at its actual cash value to the par or face value of the stock.

This resolution places certain restrictions on the new company to which the Northern Pacific Railroad Company is not subject.

It provides that such company shall sell to any applicant therefor, for purposes of actual settlement and cultivation, in tracts of not less than 40 nor more than 160 acres each, at a price not exceeding $2.50 per acre, any agricultural land lying not more than a mile from its road and then unsold, of the lands heretofore granted to the Northern Pacific Railroad and acquired by the purchasers under such foreclosure proceedings. This restriction, however, is not to apply to lands chiefly valuable for timber, coal, iron or stone, nor to arid lands; the new company having the right to reserve from such sale arid lands, and to otherwise dispose of such tracts or bodies of the same as it shall deem necessary or advisable, for use in any way in promoting or developing irrigation through companies or associations organized under and subject to the laws of the
191 States in which such lands are situated.

It is also provided in this measure that neither the Northern Pacific Railroad Company nor such successor corporation, its successors or assigns, shall consolidate its stock, or the stock at any time by it held in any subsidiary corporation with, or sell, convey or lease said railway, or by other corporate action give control or management over and of the same to any corporation, company, person or association of persons whatever without the consent of Congress; and any contract entered into by such successor company in violation of such provisions shall be null and void, and may be enjoined at the suit of the United States or any State in which said road or any part thereof is situate, in any court of competent jurisdiction.

The resolution also provided that nothing in it contained shall be construed as making any additional grant of lands to such successor corporation, or as a waiver of any right of the United States now existing to enforce any forfeiture of lands heretofore granted to the said Northern Pacific Railroad Company, or as in any manner affecting the vested rights of any

settler or settlers on any of the lands heretofore granted to the Northern Pacific Railroad Company, or any purchaser or purchasers of such lands from said company.

The right to alter, amend or repeal this resolution is also by express terms reserved by Congress.

Your committee therefore report back the joint resolution (S. R. 124) with the following amendments, and recommend its passage:

On page 2, in lines 16 and 17, strike out the following words: "upon such terms and conditions as may be provided in the plan of reorganization filed aforesaid."

192 On page 2, in line 18, strike out the word "such."

On page 2, in line 22, after the word "constructed," insert the following words: "the interest on any of which bonds shall not exceed four per centum per annum."

On page 2, in line 22, strike out the word "such."

On page 2, in line 23, strike out the following words: "as shall have been authorized by such plan," and insert in lieu thereof the following: "Not exceeding in the aggregate one hundred and fifty-five million dollars, of which amount not exceeding seventy-five million may be preferred, but the preference of the preferred stock as to dividends shall not exceed four per centum per annum."

On page 2, in line 24, strike out the third word "as," and insert in the same line, after the word "stock," the word "as," and strike out in the same line the word "have" and insert in lieu thereof the word "be."

On page 2, in line 25, strike out the following words: "Under such plan," and insert in lieu thereof the following: "under such foreclosure proceedings."

On page 3, in line 1, strike out the word "estimated."

On page 3, in line 2, after the word "stock," insert the following: "which may be common stock or preferred stock or both, as may be authorized at stockholders' meetings."

On page 4, in line 4, after the word "stock" insert the following: "or the stock at any time by it held in any subsidiary corporation."

On page 4, in lines 7, 8 and 9, strike out the following words: "owning, operating or controlling a parallel and competing line of railway," and insert in lieu thereof the following

193 words: "whatever without the consent of Congress."

Add to the end of the resolution the following: "That

Congress shall at all times have the power to alter, amend, or repeal this resolution."

U. S. Senate.

Office of the Secretary.

I, Charles G. Bennett, Secretary of the United States Senate, do hereby certify that the foregoing printed paper, number pages 1 to 3, inclusive, is a correct and authentic copy of the original thereof on file in this office. Senate Report No. 7776, 54th Congress, 1st Session.

Given under my hand and the seal of the Senate of the United States this second day of June, A. D. nineteen hundred and six.

[Seal] CHARLES G. BENNETT,
Secretary.

Endorsed: Complainant's Exhibit M. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

194 Complainant's Exhibit N.

Extract
From the
Journal of the Senate of the United States.

Fifty-fourth Congress, April 8, 1896.
First Session. Pages 228, 229.

Mr. Mitchell, of Oregon, introduced a joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding $2.50 per acre the agricultural lands within its grant, and to prohibit said [said] company or any successor company from giving by consolidation, sale, or other corporate action, control of its railroad to any corporation, company, person, or association of persons owning, operating, or controlling a parallel or competing railroad; which was read the first and second times by unanimous consent and referred to the Committee on the Judiciary.

April 21, 1896.
Page 253.

Mr. Mitchell, of Oregon, from the Committee on the Judiciary, to whom was referred the joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Rail-

road Company, to secure to actual settlers the right to purchase at a price not exceeding $2.50 per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale or other corporate action, control, of its railroad to any cor-
195 poration, company, person, or association or persons owning, operating or controlling a parallel or competing railroad reported it with amendments and submitted a report (No. 776) thereon.

I, Charles G. Bennett, Secretary of the United States Senate do hereby certify that the foregoing typewritten sheet is a true and accurate copy of entries in the Journal of the Senate of the United States relating to the joint resolution (S. R. 124), 54th Congress, First Session.

Given under my hand and the seal of the Senate of the United States this Second day of June, A. D. nineteen hundred and six.

[Seal] CHARLES G. BENNETT,
Secretary.

Endorsed: Complainant's Exhibit N. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

196 Complainant's Exhibit O.

Extract
From the
Journal of the Senate of the United States.

54th Congress, 1st Session. April 8, 1896. Pages 228-229.

Introduction of Bills and Joint Resolution.

Mr. Mitchell, of Oregon, introduced a joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding $2.50 per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action, control of its railroad to any corporation, company, person, or association of persons owning, operating or controlling a parallel or competing railroad; which was read the first and second times by unanimous consent and referred to the Committee on the Judiciary.

Reports of Committees.

April 21, 1896.
Page 253.

Mr. Mitchell, of Oregon, from the Committee on the Judiciary, to whom was referred the joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company, to secure to actual settlers the right
197 to purchase at a price not exceeding $2.50 per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action, control of its railroad to any corporation, company, person or association of persons owning, or operating a parallel or competing railroad, reported it with amendments and submitted a report (No. 776) thereon.

I, Charles G. Bennett, Secretary of the United States Senate, do hereby certify that the above typewritten paper is a true and authentic copy of extracts from the Journal of the United States Senate for the First Session of the Fifty-fourth Congress relating to Senate Joint Resolution No. 124.

Given under my hand and the Seal of the United States Senate this eleventh day of August, A. D. 1906.

[Seal] CHARLES G. BENNETT,
Secretary.

Congressional Record—Senate.

54th Congress. January 23, 1897,
2nd Session. Page 1099.

Order of Business.

The Vice-president (at 12 o'clock and 15 minutes p. m.) The morning business is closed.

Mr. Platt. I suggest that we might go on with the order, although the hour of half past 12 has not been reached.
198 The Vice-president. Is there objection? The Chair hears none, and the Calendar under Rule VIII is in order. The first case will be announced.

Northern Pacific Railroad Company.

The joint resolution (S. R. 124) to facilitate the reorganization of the Northern Pacific Railroad Company, to secure to actual settlers the right to purchase at a price not exceeding $2.50 per acre the agricultural lands within its grant, and to prohibit said company, or any successor company from giving, by consolidation, sale, or other corporate action, control of its railroad to any corporation, company, person, or association of persons owning, operating, or controlling a parallel or competing railroad, was announced as next in order.

Mr. Gorman. Let the joint resolution go over.

The Presiding officer. Objection being made, the joint resolution will go over.

I, Charles G. Bennett, Secretary of U. S. Senate, do hereby certify that the foregoing typewritten paper is a correct and authentic copy of extracts from the Congressional Record for the Second Session of the Fifty-fourth Congress relating to the consideration in the United States Senate of the joint resolution S. R. 124.

Given under my hand and the seal of the United States Senate this thirteenth day of August, A. D. Nineteen hundred and six.

[Seal] CHARLES G. BENNETT,
Secretary.

Endorsed: Complainant's Exhibit O. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy
199 Clerk.

Defendant's Exhibits.

Defendant's Exhibit No. 1.

Circuit Court of the United States.

For the District of Minnesota.

The Farmers' Loan and Trust Company,
Against In Equity.
Northern Pacific Railroad Company and others.

Original Decree.

This cause came on to [—] heard on the Bill of complaint filed herein on May 26, 1906, by the complainant the Farmers' Loan and Trust Company and the answers of all the defendants herein to the said bill, and upon the pleadings, herein and upon the entire record in this cause: and it appearing to this Court that said Bill of Complaint and a certain Bill and Supplemental Bill of Complaint pending in the Circuit Court of the United States for the Eastern District of Wisconsin, between the same parties, were brought for the purpose of sequestrating, selling and distributing among the creditors and parties entitled thereto all the lands, assets, property and effects of said defendant the Northern Pacific Railroad Company, other than the property in and by the decree of foreclosure heretofore entered in this cause on the 29th day of April, 1896, and in said Circuit Court of the United States for the Eastern district of Wisconsin, on the 27th day of
200 April, 1896, found to be covered by the mortgage therein described and executed by said defendant Railroad Company to the Farmers' Loan and Trust Company,

as trustee, or by said decrees directed to be sold thereunder; and it further appearing that certain of said remaining lands, assets, property, and effects are within the jurisdiction of this Court, and that a portion thereof are within the jurisdiction of said Circuit Court of the United States for the Eastern District of Wisconsin: and it further appearing that a final decree of sequestration was taken and entered on the 25th day of May 1896, in said suit now pending in said Circuit Court of the United States for the Eastern District of Wisconsin, and a certified copy of said decree having been filed in this cause in this court: and it appearing that said Circuit Court of the United States for the Eastern District of Wisconsin is possessed of primary jurisdiction of the matters involved in this cause, and that said decree of sequestration entered in said Circuit Court of the United States for the Eastern District of Wisconsin is in the words and figures following, to-wit:

Circuit Court of the United States, for the Seventh Judicial Circuit Eastern District of Wisconsin.

The Farmers' Loan and Trust Company, Complainant.

vs.

Northern Pacific Railroad Company, Philip B. Winston, George R. Sheldon, William S. P. Prentice, William C. Sheldon, Jr. surviving partners of the firm of William C. Sheldon & Co., Edward D. Adams, Johnston Livingston and Charles W. Van Nostrand and others, Defendants.

Supplemental Decree.

201 This cause came on to be further heard upon the bill of complaint filed herein on August 15th, 1893, by the Farmers' Loan and Trust Company, Philip B. Winston, George R. Sheldon, William S. P. Prentice and William C. Sheldon, Jr., with one William C. Sheldon, since deceased, and upon the answer of the Northern Pacific Railroad Company thereto filed herein on said day, and upon the Supplemental Bill of the complainant herein filed this day and the answers of the Northern Pacific Railroad Company and the other defendants thereto and upon the other pleadings and proofs herein and upon all the papers on file, and was argued by counsel, and upon consideration thereof, it was, on motion of Turner, McClure & Rolston, and Winkler, Flanders, Smith, Bottum and Vilas, Solicitors for the complainant, the Farmers' Loan and Trust Company, all the other parties appearing by counsel as follows, to-wit: Northern Pacific Railroad Company by Silas W. Pettit, Esq., and John F. Harper, Esq., its counsel; Edward D. Adams, Philip B. Winston, George R. Sheldon, William S. P. Prentice, William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Co., by William Nelson Cromwell,

Esq., as counsel. Johnston Livingston and Charles V. Van Nostrand by Francis Lynde Stetson, Esq., as counsel, and no one opposing it was thereupon

Ordered, adjudged and decreed as follows:

First: That the equity of said bill and supplemental bill is with the complainant The Farmers' Loan and Trust Company, and that the complainant is entitled to the relief therein prayed.

Second: It is hereby referred to Alfred L. Carey, Esq., of Milwaukee, as Special Master, to take an account of all the lands, assets, property and effects of said Northern
202 Pacific Railroad Company not found in and by the decree of foreclosure and sale entered herein to be covered by the mortgages of said Railroad Company executed to the Farmers' Loan and Trust Company, as trustee, or directed to be sold thereunder, in whosesoever hands the same may be and of the property as to which the receivership is hereby continued or created and of all other property which has come or shall hereafter come into the hands of the receivers under this decree, and to ascertain and report to the court the names and residences of the creditors of said Railroad Company and the amounts and particulars of the respective claims of such claimants against said Railroad Company or its property, and it is ordered that the parties to this suit and the receivers do attend from time to time before said Special Master as required by the order or summons of said Special Master, with the books, papers and documents in their possession relating to such property of said railroad company, that the said Special Master give notice by publication according to the course, rules and practice of this court in such cases, to all creditors of said Railroad Company not found in and by said decree of foreclosure to be covered by said mortgages to the Farmers' Loan and Trust Company, as trustee, or directed to be sold thereunder, to exhibit their claims in such manner and form as he, the said Special Master, may direct and approve, at or before such time and at such place as said Special Master may designate for that purpose, and all creditors and claimants failing to exhibit their claims to him in such manner and form within the time limited by him for that purpose shall be excluded from the benefit of the said reference under this order.

203 Third: That said Special Master shall pass the accounts of said receivers herein as to the matters covered by this decree, and fix the amount and items of property with which said receivers are or shall become chargeable, and on the proceedings before said Special Master any creditor or

claimant who shall have filed a claim shall be allowed to except to the claim of any other claimant or creditor, and the said liberty of exception is given to either of the parties to this cause and to the said receivers, and thereupon the said Special Master shall proceed to hear and determine without any special order, the matters of such exception, and embrace his conclusions thereon in his report to this court; and he is hereby authorized at the request of either party to any claim to make a separate report to the court upon such claim and to continue to make such separate reports from time to time whenever so requested and as the exigencies of the case may require.

Fourth: That the lands, assets, property and effects, real and personal, wheresoever situated, of said The Northern Pacific Railroad Company, other than the property found in and by said decree of foreclosure to be covered by said mortgages to the Farmers' Loan and Trust Company, as trustee, or directed to be sold thereunder, be sequestrated, sold and distributed, and that Edwin H. McHenry and Frank G. Bigelow, the receivers herein, be and they are hereby continued and appointed as final receivers of said lands, assets, property and effects with all the usual powers and duties of receivers in such cases and all the powers heretofore granted to them in the orders whereby they were appointed receivers herein, and that the said defendant Railroad Company except as to
204 moneys by it received under order of any of its property other than the property found in and by said decree to be covered by said mortgages to The Farmers' Loan and Trust Company, as trustee, or directed to be sold thereunder, are hereby directed to deliver the same to said receivers. And that the said defendant the Northern Pacific Railroad Company, do forthwith execute, acknowledge and deliver unto said receivers as such their successors and assigns, deed or deeds and assignments, sufficient in law, of all its right, title, interest and claim in, to and upon all such other lands, property, assets and effects, and in and to any rights under any grant to it by the Congress of the United States relating to any such other lands, property, assets, or effects, and fully authorizing and empowering such receivers, their successors and assigns, in the name of said defendant or otherwise, as they may be advised, to claim and receive from the United States patents or other sufficient evidence of title, to the such other lands, nor theretofore patented, whether such other lands be within the original grant limits or in the indemnity limits of such grant of the United States.

Fifth: That said receivers shall forth proceed to take possession of all such other property, assets and effects of said

Railroad Company not already in their possession, and they are hereby authorized and directed from time to time to make sale or sales of such other lands, property, assets and effects at public or private sale in accordance with the orders entered herein on the 22nd day of September, 1893, and the 14th day of November, 1893, and such further directions as the Court may hereafter make herein, and in the meantime, to act under and in accordance with said orders hereby confirmed
205 and continued; and to sue for, recover and collect and reduce to money all such other claims, demands, bills, accounts, and rights of action of said Railroad Company, and they may compromise or sell by public auction on due notice such as are doubtful or uncollectible and after deducting the amounts necessarily expended by them shall retain all moneys received by them subject to the further order of this court.

Sixth: That either party or the said Receivers may from time to time apply to this court for further directions at the foot of the decree or on any report of the Special Master, and the costs and expenses of said references may be charged upon and paid out of the said funds in the hands of said Receivers unless otherwise directed by the said Special Master, who may award costs in his discretion, subject to review by the court, to or against any claimant, and all questions not herein disposed of are reserved for further hearing and decision, and jurisdiction in this cause is detained for the purpose and for the purpose of enforcing all the provisions of this decree. Dated May 25th, 1895.

(Signed) WM. H. SEAMAN,
Judge.

Thereupon, being fully advised in the premises, on motion of the Farmers' Loan and Trust Company, by its solicitors, Turner, McClure & Rolston and Eller & How, the other defendants having appeared by counsel, to-wit: The Northern Pacific Railroad Company by F. W. M. McCutcheon, its counsel P. B. Winston, George R. Sheldon and others by William Nelson Cromwell, their counsel, and not opposing.

206 It Is Ordered, Adjudged And Decreed by this Court that the pleadings herein and the aforesaid decree entered in the Circuit Court of the United States for the Eastern District of Wisconsin on the 25th day of May, 1896, be and the same are hereby recognized as constituting sufficient reason for the passing of the present order and decree by this Court.

It Is Ordered, Adjudged And Decreed that William D. Cornish of St. Paul, be and he is hereby appointed Special Master

in this suit to ascertain and report to this court the names and residences of the creditors of said Railroad Company, who reside in this district, the amounts due to them and the securities and liens held by them respectively for the payment of their claims. Within six weeks from this date, said master shall publish a notice to said creditors of said company once in each week for four successive weeks in the St. Paul Pioneer Press and in the St. Paul Daily Dispatch to the effect that they must file and present their claims to him at St. Paul in this district, on or before the first day of October A. D. 1896, and that if they fail so to do they will be excluded from the benefits of this decree, the references hereunder and the subsequent proceedings herein. The Special Master shall hear the proof of such claim at St. Paul in this district upon reasonable notice to the claimants respectively and to the parties to this suit, of the time and place of such hearing. He shall report to this court with all convenient speed, and exceptions may be taken to his report by any of said creditors or by any of the parties to this suit, within thirty days after the filing thereof,
207 and the questions presented by said exceptions and the question of the confirmation of his report shall then be heard and determined by this Court. Upon the determination of these questions, a certified copy of his report and of the order of this court, allowing the claim referred to therein shall be forwarded to the Circuit Court of the United States for the Eastern District of Wisconsin. All charges against, and liens upon any of the property of the Northern Pacific Railroad Company in this district not covered by the decree of foreclosure against it in this court, may be presented to and reported by, said master herein and may be enforced by proper proceedings in this court notwithstanding this order and decree. The creditors of the Northern Pacific Railroad Company, who reside in this district, are not required to present or prove their claims in any other way than as is hereinbefore directed in order to share in the benefits of this decree the reference hereunder and the subsequent distribution of the proceeds of the property in this suit. In case the claims of the creditors residing in this state, as finally allowed by this court, shall not, upon due presentation of their allowance as aforesaid to the Circuit Court of the United States for the Eastern District of Wisconsin, be there allowed and respectively classified with the same class of claims otherwise allowed in said court, or shall not be permitted to receive a pro rata share with such claims in the distribution of the proceeds of the property covered by the decree in that court in this case, then any such creditor or claimant may apply to this court for the collection and enforcement thereof

and for this purpose this court reserved and retains jurisdiction, control and the right of disposition of all the property of the Northern Pacific Railroad Company in this district, not covered by said foreclosure decree, and of all the proceeds thereof, notwithstanding any orders or provisions
208 hereinbefore contained herein. On the first day of August, 1896, and of every third month thereafter the receivers appointed hereunder shall file in this court a report showing the disposition of any property of the Northern Pacific Railroad Company in this district sold or disposed of by them under this order and decree and of the proceeds thereof.

Subject to the foregoing provisions of this decree and except as they modify the same, the decree of the United States Circuit Court for the Eastern District of Wisconsin, is hereby adopted and made the order and decree of this court, and this court doth now adjudge and decree that the lands, assets, property and effects of the said Northern Pacific Railroad Company situated within the jurisdiction of this court and other than the property found in the and by said decree of foreclosure to be covered by said mortgage to the Farmers' Loan and Trust Company, as trustee, and directed to be sold thereunder by the decree of foreclosure in this court, be sequestrated, sold and distributed. Edward H. McHenry and Frank G. Bigelow the receivers appointed by said Circuit Court of the United States for the Eastern District of Wisconsin, are hereby appointed final receivers of the remaining lands, assets, property and effects of the Northern Pacific Railroad Company within this district and they are instructed to do and perform all and singular the things directed by this decree.

St. Paul, May 27, 1896.

WALTER H. SANBORN,
Circuit Judge.

Endorsed: Decree Filed May 27th, 1896. Oscar B. Hillis, Clerk.

209 United States of America,
District of Minnesota,
Third Division—Set.

I, Henry D. Lang, Clerk of the Circuit Court of the United States for the District of Minnesota, do hereby certify that I have carefully compared the foregoing paper writing with the original thereof, which is in my custody as such clerk, and that the said paper writing is a correct copy of such original and of the whole thereof, in the cause therein named.

Witness my hand as Clerk, and the seal of said Court. Done at my office in Saint Paul, Minnesota, this 30th day of October, A. D. 1899.

Seal
U. S. Circuit Court
Dist. of Minnesota.

(Signed) HENRY D. LANG, Clerk,
By Louis B. Trott, Deputy.

Ten Cent Revenue Stamp.

Endorsed: Defendant's Exhibit No. 1. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

Defendant's Exhibit No. 2.

210 Circuit Court of the United States, Eighth Judicial Circuit, District of Minnesota, Third Division.

The Farmers' Loan and Trust Company, Complainant,
vs.
Northern Pacific Railroad Company, Phillip B. Winston, George R. Sheldon, William S. P. Prentice, William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Co., et al., Defendants.

May 5, 1899.

This cause coming on to be heard on this day, upon all the records and proceedings herein, and upon the petition of Edwin H. McHenry and Frank G. Bigelow, receivers herein, filed on this day: and it appearing that an order has been entered in a certain proceeding between the same parties in the Circuit Court of the United States for the Eastern District of Wisconsin, to which this proceeding is ancillary, in the following form, namely:

Circuit Court of the United States, Eastern District of Wisconsin.

The Farmers' Loan and Trust Company, Complainant,
against
Northern Pacific Railroad Company, Phillip B. Winston, George R. Sheldon, William S. P. Prentice and William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Co., et al., Defendants.

211 April 27th, 1899.

This cause coming on this day to be heard upon all the record and proceedings herein, and upon the petition of Edwin H. McHenry and Frank G. Bigelow, the Receivers herein, filed on September 25, 1897, and no one opposing, it is thereupon

Ordered that the prayer of said petition be and the same

hereby is granted, and that all the lands granted by Congress to aid in construction and equipment of the railroads of the defendant, the Northern Pacific Railroad Company, and all rights of said defendant under the several land grants made to it by Congress in any such lands lying within the State of Minnesota and State of North Dakota east of the Missouri River, shall be sold at public sale to the highest bidders, in the following manner:

I. Such sale shall be made by Alfred L. Cary, Esq., hereby appointed Special Master for that purpose.

II. All of said lands for which letters patent have been issued to said defendant, the Northern Pacific Railroad Company, and the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said company, shall be sold in single sections or subdivisions thereof at the following places:

(a) All of said lands which lie within the State of North Dakota shall be sold at the United States government building in the City of Fargo, in Cass County in said state.

(b) All of said lands which lie within the State of Minnesota shall be sold at the United States government building in the City of St. Paul, in Ramsey County in said state.

III. All lands for which patents have not issued,
212 and which have not been selected and certified to said company, but to which said Northern Pacific Railroad Company is entitled under said grants of Congress, and all rights of said Northern Pacific Railroad Company to receive from the United States any lands which have not been certified or patented to said railroad company, whether under the grant expressed in the Act of Congress of July 2, 1864, or under any subsequent grant, by way of indemnity or otherwise, to said Company, together with all the right, title, interest and claim in or to any such lands, and all its rights to receive from the United States patents therefor; and also all right, title, interest and equality in and to any other lands to which said Northern Pacific Railroad Company may be entitled, and which may have accrued or shall hereafter accrue to it under any of said land grants; and also all right, title, equity and interest in and to any lands covered by or included in any of said land grants and not hereinbefore specified, shall be sold as follows:

(a) As to all of such lands and rights in respect of lands situated within the State of North Dakota, such sale shall be made in one parcel at the United States government building, in Fargo in said state.

(b) As to all such lands, and rights in respect of lands situated within the State of Minnesota, such sale shall be made in one parcel at the United States government building in St. Paul in said state.

IV. Such sales shall respectively be made upon a day or days to be fixed by said Special Master and notice of the time and place of sale, describing briefly the property and rights to be sold, and referring to this order, shall be published as follows:

213 (a) Sixty days' previous notice of the time and place of the sale of the patented lands and of the said unpatented lands and rights to lands within the State of North Dakota, shall be given by the Special Master by publishing the same once at least sixty days preceding the day of sale, and also at least once in each week, beginning on any day of the week, for the term of six successive weeks preceding the day of sale, in a newspaper of general circulation published in each of the following places in North Dakota, to-wit:

Fargo and Bismark.

(b) Sixty days' previous notice of the time and place of sale of the patented lands and of the said unpatented lands and rights to lands within the State of Minnesota, shall be given by the Special Master by publishing the same once at least sixty days preceding the day of sale, and also at least once in each week beginning on any day of the week, for the term of six successive weeks preceding the day of sale, in a newspaper of general circulation published in each of the following places in the State of Minnesota, to-wit:

St. Paul, Duluth, Brainerd and Moorehead.

The Special Master may adjourn or postpone, by public announcement, said sales or any of them as to any property to be sold thereat; and without any further notice may proceed with such sale or sales on any day to which the same may be adjourned.

V. The Special Master shall receive no bids from any one offering to bid for said patented lands, or lands selected and certified but not patented, who shall not first deposit with him, as a pledge that he will make good his bid in case of acceptance, the sum of ten dollars for each section of such
214 lands for which such bidder desires to bid, in money or by a certified check upon any national bank or trust company in the City of New York or in the City of St. Paul, Minnesota.

Upon the acceptance of any bid for any of said patented lands, or lands selected and certified but not patented, the person to whom the same shall have been struck off shall deposit with the Special Master ten per cent of the total amount of his bid for such lands, either in cash or in a certified check upon any national bank or trust company in the City of New York or in the City of St. Paul, Minnesota.

VI. The Special Master shall receive no bid from any one offering to bid for said unpatented lands and rights who shall not first deposit with him, as a pledge that he will make good his bid in case of acceptance, a sum equal to five per cent of the amount of his bid, in money or in a certified check upon a national bank or trust company in the City of New York or in the City of St. Paul, Minnesota.

Upon the acceptance of any bid for said unpatented lands and rights, the bidder shall forthwith deposit with said Special Master a sum equal to ten per cent of the amount of his bid, in money or in a certified check on any national bank or trust company in the City of New York or in the City of St. Paul, Minnesota.

VII. Upon the confirmation of any sale by the Court, the purchaser shall make such further payment or payments in cash on account of his bid as the Court may from time to time direct. The purchaser of any parcel may satisfy and make good any part of his bid not required to be paid in cash, by executing and delivering to the said Master an assign-
215 ment of any claim against said Northern Pacific Railroad Company which shall have been, at the time of such assignment, finally allowed by the Court in this suit and of which such purchaser shall then be the owner; and such purchaser shall be credited therefor, on account of his bid, with such sums as would be payable on such claims out of the purchase price of all the lands if the whole amount thereof had been paid in cash. If the credit to which the owner of any claims so assigned would be entitled by reason thereof shall exceed the amount due from him upon such bid in excess of the amount required to be paid in cash, then such assignment to said Master may be of such amount out of the total of the said claim as may be necessary to make up the amount so due on such bid or bids; and the right of such purchaser in respect of the balance due on such claim or claims shall not be affected thereby.

All such assignments shall be filed in the office of the Clerk of this Court by said Master, with his report, and shall, if the said report and sales be confirmed, operate to extinguish wholly or protanto, as the case may be, the claim or claims of such purchaser so assigned.

VIII. All sums of money received by the Special Master shall forwith be deposited with the Clerk of this Court subject to the order of this Court.

In case any bidder for any of said parcels shall fail to make the deposits required therefor, the lands or rights struck off to him shall then and there be offered for sale without further notice or advertisement.

216 Any cash which any successful bidder may previously have deposited as a pledge that he would make good his bid, shall be received on account of the amount required to be paid by him on the acceptance of his bid.

By the Court,

JAS. G. JENKINS,
Circuit Judge.

And all the parties to this action appearing and consenting thereto, and no reason appearing to the Court why said petition should not be granted.

It is thereupon ordered that the said order of the Circuit Court of the United States for the Eastern District of Wisconsin, entered on the 27th day of April, 1899, be and the same is hereby adopted and in all things made the order of this court herein.

WALTER H. SANBORN,
Circuit Judge.

St. Paul, May 5, 1899.

Endorsed: Defendant's Exhibit No. 2. Filed Dec. 1st, 1906. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

217 Defendant's Exhibit No. 3.

Circuit Court of the United States, District of Minnesota, Third Division.

The Farmers' Loan and Trust Company, Complainant,

vs.

Northern Pacific Railroad Company, Phillip B. Winston, George R. Sheldon, William S. P. Prentice, William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Co., Defendants.

July 5, 1899.

This cause coming on to be heard on this day upon all the records and proceedings herein, and upon the petition of Edwin H. McHenry and Frank G. Bigelow, receivers herein, filed on this day: and it appearing that an order has been entered in

a certain proceeding between the same parties in the circuit Court of the United States for the Eastern District of Wisconsin, to which this proceeding is ancillary, in the following form, namely:

United States Circuit Court, Eastern District of Wisconsin.
The Farmers' Loan and Trust Company, Complainant,
vs.
Northern Pacific Railroad Company et al., Defendants.

218 May 25, 1899.

The decree entered herein and dated April 27, 1899, authorizing sale of lands east of Missouri River in Minnesota, and North Dakota, is hereby vacated and set aside.

Enter. J. G. J. By the Court.

Circuit Court of the United States, Eastern District of Wisconsin.

The Farmers' Loan and Trust Company, Complainant,
vs.
Northern Pacific Railroad Company, Phillip B. Winston, George R. Sheldon, William S. P. Prentice and William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Co., et al., Defendants.

May 25th, 1899.

This cause coming on this day to be heard upon all the record and proceedings herein, and upon the petition of Edwin H. McHenry and Frank G. Bigelow, the Receivers herein, filed on September 25, 1897, and no one opposing, it is thereupon

Ordered and decreed that the prayer of said petition be and the same is granted, and that all the lands granted by Congress to aid in construction and equipment of the railroads, of the defendant, the Northern Pacific Railroad Company, and all rights of said defendant under the several land grants made to it by Congress in any such lands lying within the State of Minnesota and State of North Dakota east of the Missouri River, shall be sold at public sale to the highest bidders, in the following manner:

219 I. Such sale shall be made by Alfred L. Cary, Esq. hereby appointed Special Master for that purpose, who is hereby required to report to the Court his doings hereunder.

II. All of the said lands for which letters patent have issued to said defendant Northern Pacific Railroad Company, and the right to receive lands for which letters patent have not

issued, but which have been selected by and certified to said company, shall be sold in single sections, or subdivisions thereof, and all lands for which patents have not issued, and which have not been selected by and certified to said company, but to which said Northern Pacific Railroad Company is entitled under said grants of Congress and all rights of said Northern Pacific Railroad Company to receive from the United States any lands which have not been certified or patented to said railroad company, whether under the grant expressed in the Act of Congress of July 2, 1864, or under any subsequent grant, by way of indemnity or otherwise, to said company, together with all the right, title, interest and claims in or to any such lands, and all its rights to receive from the United States patents therefor; and also all right, title, interest and equity in and to any other lands to which said Northern Pacific Railroad Company may be entitled, and which may have accrued or shall hereafter accrue to it under any of said land grants; and also all right, title, equity and interest in and to any lands covered by or included in any of said land grants and not hereinbefore specified, shall be sold in one parcel as to such lands and rights in each county, at the following places:

(a) Minnesota:

220 1. All of said lands and rights to lands within the County of Pine, in the State of Minnesota, shall be sold at the court house of said county at Pine City.

2. All of said lands and rights to lands within the County of St. Louis, in the State of Minnesota, shall be sold at the court house of said county at Duluth.

3. All of said lands and rights to lands within the County of Lake in the State of Minnesota, shall be sold at the court house of said county at Two Harbors.

4. All of said lands and rights to lands within the County of Itasca, in the State of Minnesota, shall be sold at the court house of said county at Grand Rapids.

5. All of said lands and rights to lands within the County of Beltrami, in the State of Minnesota, shall be sold at the court house of said county at Bemidji.

6. All of said lands and rights to lands within the County of Cass, in the State of Minnesota, shall be sold at the court house of said county at Walker.

7. All of said lands and rights to lands within the County of Hubbard, in the State of Minnesota, shall be sold at the court house of said county at Park Rapids.

8. All of said lands and rights to lands within the County of Wadena, in the State of Minnesota, shall be sold at the court house of said county at Wadena.

9. All of said lands and rights to lands within the County of Todd, in the State of Minnesota, shall be sold at the court house of said county at Long Prairie.

10. All of said lands and rights to lands within the County of Douglas, in the State of Minnesota, shall be sold at the court house of said county at Alexandria.

221 11. All of said lands and rights to lands within the County of Grant, in the State of Minnesota, shall be sold at the court house of said county, at Elbow Lake.

12. All of said lands and rights to lands within the County of Otter Tail, in the State of Minnesota, shall be sold at the court house of said county, at Fergus Falls.

13. All of said lands and rights to lands within the County of Wilkin, in the State of Minnesota, shall be sold at the court house of said county, at Breckenridge.

14. All of said lands and rights to lands within the County of Clay, in the State of Minnesota, shall be sold at the court house of said county, at Moorhead.

15. All of said lands and rights to lands within the County of Norman, in the State of Minnesota, shall be sold at the court house of said county, at Ada.

16. All of said lands and rights to lands within the County of Becker, in the State of Minnesota, shall be sold at the court house of said county, at Detroit.

17. All of said lands and rights to lands within the County of Crow Wing, in the State of Minnesota, shall be sold at the court house of said county, at Brainerd.

18. All of said lands and rights to lands within the County of Aitkin, in the State of Minnesota, shall be sold at the court house of said county, at Aitkin.

19. All of said lands and rights to lands within the County of Morrison, in the State of Minnesota, shall be sold at the court house of said county at Little Falls.

222 20. All of said lands and rights to lands within the County of Mille Lacs, in the State of Minnesota, shall be sold at the court house of said county at Princeton.

21. All of said lands and rights to lands within the County of Carlton, in the State of Minnesota, shall be sold at the court house of said county at Carlton.

(b) North Dakota:

1. All of said lands and rights to lands within the County of Dickey, in the State of North Dakota, shall be sold at the court house of said county, at Ellendale.

2. All of said lands and rights to lands within the County of Richland, in the State of North Dakota, shall be sold at the court house of said county at Wahpeton.

3. All of said lands and rights to lands within the County of Traill, in the State of North Dakota, shall be sold at the court house of said county at Hillsboro.

4. All of said lands and rights to lands within the County of Cass, in the State of North Dakota, shall be sold at the court house of said county at Fargo.

5. All of said lands and rights to lands within the County of Ransom, in the State of North Dakota, shall be sold at the court house of said county at Lisbon.

6. All of said lands and rights to lands within the County of LaMoure, in the State of North Dakota, shall be sold at the court house of said county at LaMoure.

7. All of said lands and rights to lands within the County of Steele, in the State of North Dakota, shall be sold at the court house of said county at Sherbrooke.

223 8. All of said lands and rights to lands within the County of Barnes, in the State of North Dakota, shall be sold at the court house of said county at Valley City.

9. All of said lands and rights to lands within the County of Griggs, in the State of North Dakota, shall be sold at the court house of said county at Cooperstown.

10. All of said lands and rights to lands within the County of Stutsman, in the State of North Dakota, shall be sold at the court house of said county at Jamestown.

11. All of said lands and rights to lands within the County of Foster, in the State of North Dakota, shall be sold at the court house of said county at Carrington.

12. All of said lands and rights to lands within the County of Wells, in the State of North Dakota, shall be sold at the court house of said county at Fessenden.

13. All of said lands and rights to lands within the County of Eddy, in the State of North Dakota, shall be sold at the court house of said county at New Rockford.

14. All of said lands and rights to lands within the County of Kidder, in the State of North Dakota, shall be sold at the court house of said county at Steele.

15. All of said lands and rights to lands within the County of Burleigh, in the State of North Dakota, shall be sold at the court house of said county at Bismarck.

16. All of said lands and rights to lands within the County of McLean, in the State of North Dakota, shall be sold at the court house of said county at Washburn.

224 17. All of said lands and rights to lands within the County of Sargent, in the State of North Dakota, shall be sold at the court house of said county at Forman.

18. All of said lands and rights to lands within the County of Logan, in the State of North Dakota, shall be sold at the court house of said county at King.

19. All of said lands and rights to lands within the County of Emmons, in the State of North Dakota, shall be sold at the court house of said county at Linton.

20. All of said lands and rights to lands within the County of McIntosh, in the State of North Dakota, shall be sold at the court house of said county, at Ashley.

The Receivers are hereby required to file schedules showing the lands and rights to be sold hereunder with the Clerk of this Court and with the clerks of the United States Circuit Courts for the Districts of Minnesota and North Dakota, respectively, at least thirty (30) days before the date of the first sale to be made hereunder.

III. Such sales shall, respectively, be made upon a day or days to be fixed by said Special Master, and notice of the times and places of said sales, describing the property and rights to be sold and referring to this decree, shall be published respectively once a week for at least four weeks prior to such sales, respectively, in a newspaper printed, regularly issued and having a general circulation in the county and state where said sales, respectively are to be made as hereinbefore provided.

The Special Master may adjourn or postpone, by public announcement, said sales or any of them as to any property to be sold thereat; and without any further notice may proceed with such sale or sales on any day to which the same
225 may be adjourned.

IV. The Special Master shall receive no bid from any one offering to bid for said patented lands, or lands se-

lected and certified but not patented, who shall not first deposit with him, as a pledge that he will make good his bid in case of acceptance, the sum of ten dollars for each section of such lands for which such bidder desires to bid, in money or by a certified check upon any national bank or trust company in the City of New York or in the City of St. Paul, Minnesota.

Upon the acceptance of any bid for any of said patented lands, or lands selected and certified but not patented, the person to whom the same shall have been struck off shall deposit with the Special Master ten per cent of the total amount of his bid for such lands, either in cash or in a certified check upon any national bank or trust company in the City of New York or in the City of St. Paul, Minnesota.

V. The Special Master shall receive no bid from any one offering to bid for said unpatented lands and rights who shall not first deposit with him, as a pledge that he will make good his bid in case of acceptance, a sum equal to five per cent of the amount of his bid, in money or in a certified check upon a national bank or trust company in the City of New York or in the City of St. Paul, Minnesota.

Upon the acceptance of any bid for said unpatented lands and rights, the bidder shall forthwith deposit with said Special Master a sum equal to ten per cent of the amount of his bid, in money or in a certified check upon any national bank or trust company in the City of New York or in the City of St. Paul, Minnesota.

226 Upon the acceptance of any bid for said unpatented lands and rights, the bidder shall forthwith deposit with said Special Master a sum equal to ten per cent of the amount of his bid, in money or in a certified check on any national bank or trust company in the City of New York or in the City of St. Paul, Minnesota.

VI. Upon the confirmation of any sale by the Court, the purchaser shall make such further payment or payments in cash on account of his bid as the Court may from time to time direct. The purchaser of any parcel may satisfy and make good any part of his bid not required to be paid in cash, by executing and delivering to the said Master an assignment of any claim against said Northern Pacific Railroad Company which shall have been at the time such assignment, finally allowed by the Court in this suit, and of which such purchaser shall then be the owner; and such purchaser shall be credited therefore, on account of his bid, with such sums as would be payable on such claims out of the purchase price of all the lands if the whole amount thereof had been paid in cash. If

the credit to which the owner of any claim so assigned would be entitled by reason thereof shall exceed the amount due from him upon such bid in excess of the amount required to be paid in cash then such assignment to said master may be of such amount out of the total of the said claim as may be necessary to make up the amount so due on such bid or bids; and the right of such purchaser in respect of the balance due on such claim or claims shall not be affected thereby.

All such assignments shall be filed in the office of the clerk of this Court by said Master, with his report, and shall, if the said report and sales be confirmed, operate to extinguish wholly or pro tanto, as the case may be, the claim or claims of such purchaser so assigned.

227 VII. All sums of money received by the Special Master shall forthwith be deposited with the Clerk of the Court subject to the order of this Court.

In case any bidder for any of said parcels shall fail to make the deposit required therefor, the lands or rights struck off to him shall then and there be offered for sale without further notice or advertisement.

Any cash which any successful bidder may previously have deposited as pledge that he would make good his bid, shall be received on account of the amount required to be paid by him on the acceptance of his bid.

By the Court,

(Signed) JAS. G. JENKINS,
Circuit Judge.

and a certified copy of said order having been filed herein, and all the parties to this action appearing and consenting thereto, and no reason appearing to the court why said petition should not be granted, it is thereupon

Ordered that the said order of the Circuit Court of the United States for the Eastern District of Wisconsin, entered on the 25th day of May 1899, be and the same is hereby adopted and in all things made the order of this court herein.

WALTER H. SANBORN.
Circuit Judge.

Endorsed: Defendant's Exhibit No. 3. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

228 **Defendants' Exhibit No. 4.**

Circuit Court of the United States. District of Minnesota.

The Farmers' Loan and Trust Company, Complainant,

vs.

Northern Pacific Railroad Company, Phillip E. Winston, George R. Sheldon, William S. P. Prentice, and William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Co., et al., Defendants.

To the Honorable the Judges of said Court in Equity Sitting:

May 25th, 1899, a certain decree of sale was entered in a certain cause in equity pending in the Circuit Court of the United States for the Eastern District of Wisconsin between the parties above named, the execution whereof, in certain respects, was confided to Alfred L. Cary, as Special Master. June 5, 1899, a decree ancillary to that above mentioned was entered in a like cause between the same parties pending in each of the following Circuit Courts of the United States, viz., that for the District of Minnesota and that for the District of North Dakota, June 8th, 1899, said Circuit Court of the United States for the Eastern District of Wisconsin entered a decree in the said cause pending therein correcting its said decree of May 25th, 1899. Decrees ancillary to that last mentioned, and correcting respectively the said ancillary decrees of June 5th, 1899, were entered respectively as follows: In the said cause in the Circuit Court of the United States for the District of Minnesota on the 9th day
229 of June, 1899, and in the said cause in the Circuit Court of the United States for the District of North Dakota on the 10th day of June, 1899.

Pursuant to said decrees, I, the said Special Master, do report as follows:

First: Schedules showing the lands and rights to be sold under said decrees were filed respectively as follows: With the clerk of the United States Circuit Court for the Eastern District of Wisconsin, at his office in the City of Milwaukee, in said district, on the 6th day of June, 1899; with the clerk of the United States Circuit Court for the District of Minnesota, at his office in the City of St. Paul, in said district, on the 8th day of June, 1899; and with the clerk of the United States Circuit Court for the District of North Dakota, at his office, in the city of Fargo, in said district, on the 9th day of June, 1899. Said schedules so filed described the said lands

and rights in the State of Minnesota as they are described in the schedules hereto annexed, numbered from "A1" to "A21" both inclusive, and the said lands and rights in the State of North Dakota, as they are described in the schedules annexed to my report of sales under said decrees to the said Circuit Court of the United States for the District of North Dakota numbered from "B1" to "B20", both inclusive.

Affidavits proving that said schedules were filed as above stated are hereto annexed and made part hereof.

Second. Schedules showing the lands and rights to be sold under said decrees within the State of Minnesota, as they are described in the schedules hereto annexed, numbered
230 from "A1" to "A21" both inclusive, were deposited and left for public inspection prior to June 16th, 1899, in each of the following passenger stations of the Northern Pacific Railway Company, to-wit. At St. Paul, Duluth, Brainerd and Moorhead in said State of Minnesota.

Affidavits proving that said schedules were deposited and left as above stated are hereto annexed and made part hereof.

Third. Pursuant to the authority vested in me by said decrees I fixed the times of the sales in said State of Minnesota to be made pursuant to said decrees respectively as follows:

1. The sale of lands and rights to lands within the County of Pine on the 17th day of July, 1899, at eleven o'clock A. M.

2. The sale of lands and rights to lands within the County of St. Louis, on the 17th day of July, 1899, at four o'clock P. M.

3. The sale of lands and rights to lands within the County of Lake, on the 18th day of July, 1899, at nine o'clock A. M.

4. The sale of lands and rights to lands within the County of Itasca, on the 18th day of July, 1899, at four o'clock P. M.

5. The sale of lands and rights to lands within the County of Beltrami, on the 19th day of July, 1899, at nine o'clock A. M.

6. The sale of lands and rights to lands within the County of Cass, on the 19th day of July, 1899, at 12 o'clock noon.

7. The sale of lands and rights to lands within the Coun-

ty of Hubbard, on the 19th day of July, 1899, at three o'clock P. M.

8. The sale of lands and rights to lands within the County of Wadena, on the 20th day of July, 1899, at nine o'clock A. M.

9. The sale of lands and rights to lands within the County of Todd, on the 20th day of July, 1899, at one o'clock P. M.

231 10. The sale of lands and rights to lands within the County of Douglas, on the 20th day of July, 1899, at five o'clock P. M.

11. The sale of lands and rights to lands within the County of Grant, on the 21st day of July, 1899, at nine o'clock A. M.

12. The sale of lands and rights to lands within the County of Otter Tail, on the 21st day of July, 1899, at Three o'clock P. M.

13. The sale of lands and rights to lands within the County of Wilkin, on the 24th day of July, 1899, at nine o'clock A. M.

14. The sale of lands and rights to lands within the County of Clay, on the 25th day of July, 1899, at eleven o'clock A. M.

15. The sale of lands and rights of lands within the County of Norman, on the 25th day of July, 1899, at four o'clock P. M.

16. The sale of lands and rights to lands within the County of Becker, on the 4th day of August, 1899, at nine o'clock A. M.

17. The sale of lands and rights to lands within the County of Crow Wing, on the 4th day of August, 1899, at two o'clock P. M.

18. The sale of lands and rights to lands within the County of Aitkin, on the 4th day of August, 1899, at four o'clock P. M.

19. The sale of lands and rights to lands within the County of Morrison, on the 5th day of August, 1899, at nine o'clock A. M.

20. The sale of lands and rights to lands within the County of Mille Lacs, on the 5th day of August, 1899, at three o'clock P. M.

21. The sale of lands and rights to lands within the County of Carlton, on the 17th day of July, 1899, at two o'clock P. M.

St. Louis County.

Seventh. That I caused notice of the time and place of sale within the County of St. Louis in said State of Minne-
232 sota, of certain property described in said decrees, namely, all the lands within the said County of St. Louis, granted by Congress to aid in the construction and equipment of the railroads of said Northern Pacific Railroad Company, and all rights of said company under the several land grants made to it by Congress, in any such lands lying within said County of St. Louis, describing the property and rights to be sold and referring to said decrees, to be published once a week for at least four weeks prior to the 17th day of July, 1899, that being the day of sale within said County of St. Louis, specified in said notice, in a newspaper printed, regularly issued and having a general circulation in said County of St. Louis and State of Minnesota.

An affidavit proving the said publication of said notice and specifying the newspaper wherein such publications were made is hereto annexed and made part hereof, and attached to said affidavit is a printed copy of said notice.

That prior to the 16th day of June, 1899, I caused a schedule of the lands within said County of St. Louis, so to be sold under said decrees, to be deposited and left for public inspection in the office of the Clerk of the District Court for said county.

An affidavit proving that said schedule was deposited and left as above stated is hereto annexed and made part hereof.

Eighth. That I attended at the time and place of sale within said County of St. Louis, specified in said notice, to-wit: on the 17th day of July, 1899, at four o'clock P. M., at the Court House in Duluth, St. Louis County, in said State of Minnesota, and then and there, pursuant to said decrees, offered at public sale the lands described in Schedule "A2" hereto an-
233 nexed and made part hereof, except those represented by "Item number" 390 in said schedule, which said offers of said lands were in single sections or subdivisions thereof, as represented by each "Item number," in said schedule, except said number 390.

That thereupon the person whose name appears in said schedule "A2," under the head of "Name of successful bidder and purchaser" opposite each "Item number," deposited with

me the sum of ten dollars for the privilege of bidding upon the land described in said schedule opposite said "Item number," and thereupon such person bid for said land the sum set opposite thereto under the head of "Amount at which struck off," and such land was struck off by me to such person for the sum so bid, he being the highest and best bidder therefor and that being the highest and best bid made for such land. That upon my acceptance of each such bid (there was a separate sale of the land represented by each "Item number" in said schedule), the said successful bidder made a further deposit with me, which, added to such preliminary deposit, made ten per cent. of the amount of each of such bids, which such deposit, both "preliminary" and "second," are stated in said schedule "A2" under the heads respectively designated therefor and opposite the lands and bids with respect to which they were made. The date of sale of the land covered by each such "Item number," is shown in said schedule under the head of "Date of Master's Sale," such date being either the date specified in said notice of sale or an adjournment duly made by me therefrom. All such sales were made at the place in said St. Louis County designated in said notice of sale.

234 The amounts for which the lands described in said schedule "A2" except those represented by "Item number" 390, were struck off and sold aggregate, $116,700.00.

The said deposits made by the successful bidders and purchasers for all such lands aggregate as follows:

Preliminary deposits	$3,890.00	
Second deposits	$7,780.00	$11,670.00
Aggregate amount yet unpaid on such sales		$105,030.00

Such deposits, "preliminary" and "second," were of the following character:

In money	$.....
By certified checks upon National Banks or Trust Companies in the City of St. Paul, Minnesota	$11,670.00
By certified checks upon National Banks or Trust Companies in the City of New York	$.....

That schedule "C2" hereto annexed and made part hereof contains a list of the unsuccessful bidders who made preliminary deposits with me as such Special Master at the said sale of lands described in said schedule "A2", showing the date and amount deposited by each, the lands as to which each deposit was made by reference to "Item number" in said schedule "A2", and the date that each such deposit was returned by me to the depositor.

Ninth. That immediately after the conclusion of the said sales of land above reported and at the same place at which such sales were made, being the place in the said County of St. Louis, designated in said notice of sale, and pursuant to said decrees, I offered for sale at public auction as one parcel all the lands, property and rights particularly de-
235 scribed in said schedule "A2" and represented by "Item number" 390 thereof.

That thereupon the Northern Pacific Railway Company offered to and did bid for said lands, property and rights, the sum of one thousand dollars, and with such offer and bid deposited with me fifty dollars by a certificate check upon the First National Bank of St. Paul, of the City of St. Paul, Minnesota.

That no other offers to bid for the said lands, property and rights described in said Schedule "A2" and represented by said "Item number" 390 thereof, were made and no other deposits were tendered for the privilege of bidding therefor, although ample opportunity was given for such offers and tenders.

That I thereupon struck off said lands, property and rights to the said Northern Pacific Railway Company, it being the only bidder, and that being the only bid therefor.

That thereupon the said Northern Pacific Railway Company upon my acceptance of its said bid for said lands, property and rights described in said Schedule "A2" and represented by said "Item number" 390 thereof, made a further deposit with me of fifty dollars by a certified check upon the First National Bank of St. Paul.

The details of said last reported sale, as above given, are contained in said schedule "A2" opposite to and in connection with "Item number" 390 thereof.

Sixty-sixth. That I caused notice of the time and place of each of the sales hereinbefore reported to be published once a week for at least four weeks prior to the dates fixed by me for said sales respectively as hereinbefore reported in The Daily Pioneer Press, a newspaper printed, regularly issued and having a general circulation in the City of St. Paul,
236 County of Ramsey, and State of Minnesota, which said notice so published referred to said decrees and described the property and rights to be sold at each of said sales.

An affidavit proving the said publications of said notice is hereto annexed and made part hereof, and attached to said affidavit is a printed copy of said notice.

Sixty-seventh. All the foregoing sales with respect to the lands heretofore contracted to be sold by the Northern Pacific Railroad Company, or by its Receivers, were made subject to the rights of the purchasers under such contracts.

All of which is respectfully submitted.

Dated, August 24th, 1899.

ALFRED L. CARY,
Special Master.

(Here follow affidavits of the Clerks of the United States Circuit Courts for Eastern District of Wisconsin, District of Minnesota, and District of North Dakota, setting forth that schedules of the lands and rights to be sold by the Special Master, pursuant to the decree of May 25, 1899, were duly filed in their respective offices, and also the other affidavits and the schedules mentioned in the foregoing report of sale.)

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Recapitulation.

Counties	Amount at which struck off.	Payments by Successful Bidder Preliminary Deposit.	Second Deposit
Pine	$ 6,000.	$ 550.	50
St. Louis	117,700.	3,940.	7,830.
Lake	12,600.	630.	630.
Itasca	14,100.	1,390.	50.
Beltrami	2,560.	200.	50.
Cass	50,100.	4,960.	50.
Hubbard	11,200.	1,070.	50
Wadena	21,700.	2,120.	50
Todd	57,000.	1,780	3,920
Douglas	13,000	650.	650
Grant	2,750	100.	175.
Otter Tail	116,950.	5,830.	5,865.
Wilken	18,600	930.	930.
Clay	64,000	3,200	3,200
Norman	63,950	2,280.	4,115.
Becker	58,800	2,940	2,940.
Crow Wing	92,000	4,600.	4,600.
Aitkin	98,200.	4,910.	4,910
Morrison	6,100	560	50.
Mille Lacs	9,300.	880.	50.
Carlton	1,000	50	50
Grand Totals	$837,850	$43,570	$40,215

Endorsed: Filed August 26, 1899.

HENRY LANG, Clerk.

Endorsed: Defendant's Exhibit No. 4. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

238 **Defendant's Exhibit No. 5.**

Circuit Court of the United States, District of Minnesota, Third Division.

The Farmers' Loan and Trust Company, Complainant,

vs.

Northern Pacific Railroad Company, Phillip B. Winston George R. Sheldon, William S. P. Prentice, William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Co., Defendants.

The report of Alfred L. Cary, as Special Master of the sales by him made of the lands and rights in respect of lands directed to be sold in and by the decrees of the Circuit Court of the United States for the Eastern District of Wisconsin, in a cause therein pending between the Farmers' Loan and Trust Company as complainant and the Northern Pacific Railroad Company and others as defendants to which this cause is ancillary, so far as such sales affect lands and rights in respect of lands in the State of Minnesota, having been filed herein; and it appearing to this Court that said Circuit Court of the United States for the Eastern District of Wisconsin in said cause to which this cause is ancillary, has upon a similar report of said Alfred L. Cary, as Special Master, and of other reports of said Alfred Cary, as Special Master of sales by him made of lands and rights in respect of lands directed to be sold under said decrees and situate elsewhere than in said State of Minnesota has entered an order in the follow-

239 ing form, viz.:

Circuit Court of the United States for the Seventh Judicial Circuit and Eastern District of Wisconsin.

The Farmers' Loan and Trust Company, Complainant,

against In Sequestration.

Northern Pacific Railroad Company, Phillip B. Winston, George R. Sheldon, William S. P. Prentice and William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Co., Edward D. Adams, Johnston Livingston, Charles B. Van Norstrand, and others, Defendants.

Now come again all the parties by their respective solicitors, and comes also the purchaser Northern Pacific Railway Company; and its petition that the several reports of Alfred L. Cary, the Special Master heretofore filed herein, of the sales by him made of the lands and rights in respect of lands in and by the decrees herein directed to be sold, should be approved, and that the sales of said lands and rights in respect of lands

of the Northern Pacific Railroad Company, briefly describes in the notice of sale thereof, should be confirmed and made absolute, came on to be heard.

And it appearing by the several reports of said Special Master, so filed as aforesaid, that he has fully complied with the directions in said decrees as to the sale of said lands and rights in respect of lands, and that such purchaser, the Northern Pacific Railway Company, was the highest and best bidder for said lands and rights in respect of lands sold as provided in said decrees, and that the same were struck off at the several sales thereof to the said purchaser.

Subject, however, as to the portions of said lands and rights in respect of lands covered thereby, to the lien of a
240 certain mortgage or deed of trust, dated January 1st, 1881, executed by the Northern Pacific Railroad Company to the Central Trust Company of New York, as trustee.

And it further appearing by such Special Master's Report, and by the said petition of the said purchaser, that the said purchaser has made the payments thus far obligatory upon it;

And it appearing by the said petition that the said purchaser, the Northern Pacific Railway Company, is a railroad corporation organized and existing under the laws of the State of Wisconsin, of which corporation every member is a citizen and a resident of the United States; that it has complied with all the requirements of law of each and every of the States of Minnesota, and North Dakota, which are the only states of the United States in which any part of the said real property is situated, so as to enable and entitle it to transact business and to hold property, real and personal, in every such State; that the said corporation being the owner and holder of claims against the Northern Pacific Railroad Company which have been finally allowed by this court to the amount of more than $87,000,000 and has tendered assignment of the same to be cancelled or credited as provided in said decrees, on account of the respective bids made by said purchaser, the Northern Pacific Railway Company, for all said lands and rights in respect of lands.

And no sufficient cause being shown against the report of the Special Master or the granting of the petition of the said purchaser;

Now, on motion of Turner, McClure & Rolston, solicitors for the complainant, the Farmers' Loan and Trust Company, and of William Nelson Cromwell of counsel for the purchaser, all the other parties appearing by Counsel, and all con-
241 senting that the said motion for confirmation of said

sale and of the said reports of said Special Master made thereon, may be now heard and determined, and all questions thereunder adjudicated.

It is hereby ordered, adjudged and decreed as follows, to-wit:

The said several reports of Alfred L. Cary, the Special Master, are in all things approved, and the respective sales by him made to the said Northern Pacific Railway Company of all and singular said patented lands and lands selected and certified and other lands and rights in respect of lands of the Northern Pacific Railroad Company, be and the same are respectively in all things ratified, approved and confirmed and made absolute, and

It is further ordered and decreed that upon delivery of the said assignments of said claim to the Special Master, but in blank as to the amount assigned out of the total of said claims above mentioned as being held and tendered by the purchaser, prior to the execution of a deed of conveyance of said parcels, the said Special Master be and he hereby is authorized to sign, seal, execute and deliver deeds of conveyance and assignments to said purchaser, the Northern Pacific Railway Company, conveying to it all and singular the said patented lands, and lands selected and certified, and other lands and rights in respect of lands sold to it as aforesaid. But in lieu of such several deeds and assignments, the Special Master may execute, acknowledge and deliver a single deed covering and conveying as an entirety all the said lands and rights in respect of lands of the Northern Pacific Railroad Company and one assignment covering all such rights in respect of lands not embraced in said deed, wheresoever situated; and in order to facilitate the recording thereof, ten originals of each of such
242 deeds or deed may be executed, acknowledged and delivered by the said Special Master, all or any one or more of which may be recorded, and each of which, when executed, acknowledged and delivered shall be deemed an original.

And it is further ordered and decreed, that the Receivers of this Court, shall make conveyances and assignments to the said purchaser, its successors or assigns, of said lands and rights to and in respect of land.

On exhibition of any such deed or assignment executed and delivered by the Special Master as herein ordered, and upon the request of the grantee or assignee thereunder, the Receivers of this Court are authorized, directed and required to let the said purchaser, and its successors and assigns, into possession of the premises, therein conveyed, and to deliver to it any

contract thereby assigned, and the Receivers of any party in this cause, having possession thereof, shall deliver such property and contracts over to the purchaser, its successors or assigns.

It is further ordered and decreed, that by way of further assurance and confirmation of title to such purchaser the said Northern Pacific Railroad Company, by its proper officers and under its corporate seal, shall sign, seal, execute, acknowledge and deliver to said purchaser, or to its successors or assigns, its deed or deeds of conveyance, assignment, transfer, release and further assurance of all the said lands and rights sold to said purchaser.

The Special Master shall hold said assignment of claims until the credit or payment on account thereof, upon the bids of such purchaser shall be adjudged by the Court and he shall then fill up the blank in the same with the amount so
243 due and file the same with the Clerk of this Court, and upon such filing of said assignment the said claims shall be and be deemed to be satisfied to the extent of the amount specified in said assignment.

Upon consent of the purchaser this decree is passed subject to the right of the Court to require as a condition thereof that upon final distribution of the fund in Court and in the hands of its Receivers there shall be paid upon all claims finally allowed and not owned by the purchaser a sum equal to ten per centum of the amount of such claims before any payment upon claims owned by the purchaser.

Sept. 16th, 1899.

(Signed) JAS. G. JENKINS,
U. S. Circuit Judge.

And a certified copy of said order having been filed herein, and all the parties to this action appearing and consenting thereto,

Now, on motion of Jared How, solicitor for the complainant, above named,

It is ordered that the said order of the Circuit Court of the United States for the Eastern District of Wisconsin, be and the same is hereby adopted and in all things made the order of this Court herein.

WALTER H. SANBORN,
Circuit Judge.

St. Paul, Sept. 20, 1899.

Endorsed: Decree of confirmation of sales of lands. Filed Sept. 20th, 1899. Henry D. Lang, Clerk. By Louise B. Trott, Deputy.

244 I, Henry D. Lang, Clerk of the Circuit Court of the United States for the District of Minnesota, do hereby certify that I have carefully compared the foregoing paper writing with the original thereof, which is in my custody as such clerk, and that the said paper writing is a correct copy of such original and of the whole thereof, in the cause therein named.

Witness my hand as Clerk, and the seal of said Court. Done at my office in Saint Paul, Minnesota, this 22nd day of April, A. D. 1903.

Seal] HENRY D. LANG, Clerk.
By Louis B. Trott, Deputy.

Endorsed: Defendant's Exhibit No. 5. Filed Dec. 1st, 1906. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

SCHEDULE A--2

LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(**Note**—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp.	R.	Area	Numbered Contract
1	E½, NW¼ & S½ SW¼	3	52	12	568.80	
2	E½ NE¼, SW¼ NE¼, SW¼ NW¼ & N½ SE¼	5	52	12	243.17	
3	SW¼ NE¼, E½ W½, SW¼ SW¼ W½ SE¼ & SE¼ SE¼	7	52	12	360.72	
4	E½ & S½ SW¼	9	52	12	400	
5	W½ & SE¼	15	52	12	480	
6	N½, N½ SE¼ & SW¼ SE¼	17	52	12	440	
7	NW¼ NW¼	27	52	12	40	
8	SW¼	29	52	12	160	
9	NE¼	31	52	12	160	
10	N½, NE¼ SW¼ & W½ SE¼	1	53	12	439.14	
11	NW¼ NE¼, N½ NW¼, SE¼ NW¼, SE¼ SW¼ & SE¼	3	53	12	359.04	
12	S½ NE¼, NW¼ & SE¼	5	53	12	398.31	
13	S½ NE¼, N½ S½, SE¼ SW¼, & SW¼ SE¼	7	53	12	322.18	
14	E½ NE¼, W½ NW¼, NW¼ SW¼ & NW¼ SE¼	11	53	12	240	
15	E½ NE¼, SW¼ NE½ & SE¼	13	53	12	280	
16	SE¼ SW¼ & SE¼	17	53	12	200	
17	NW¼ NE¼	21	53	12	40	
18	E½ NE¼, NW¼ NE¼ & SE¼ SW¼	23	53	12	160	
19	SE¼ SW¼, SW¼ SE¼, & E½ SE¼	25	53	12	160	
20	NW¼ NW¼ & SE¼ SW¼	27	53	12	80	
21	NE¼ SW¼	29	53	12	40	
22	SW¼ NE¼, SE¼ NW¼, SW¼ W½ SE¼ & SE¼ SE¼	31	53	12	363.99	
23	W½ NE¼, E½ NW¼, W½ SW¼, SE¼ SW¼ & SE¼	33	53	12	440	
24	SE¼ NE¼ & SE¼	35	53	12	200	
25	All, less R-W 12 acres	1	54	12	637.20	
26	Lots 2, 3, 4, 5, 7 & SW¼ NW¼	3	54	12	209.66	
27	SW¼ NW¼, NE¼ SW¼, lots 5, 7, 8 & 9	5	54	12	233.05	
28	NE¼ SW¼, Lots 3, 4, 7, 8 & 10	7	54	12	250.70	
29	NW¼ NE¼, NW¼ & NW¼ SW¼	9	54	12	240	
30	NE¼ NE¼, W½ NE¼, S½ NW¼, W½ SE¼ & SE¼ SE¼, Lots 3, 4, 5, 6	11	54	12	449.05	

SCHEDULE A--2

LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railway Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota, on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp. N	R. W	Area	Numbered Contract
31	All	13	54	12	640	
32	E½, NW¼, NE¼ SW¼ & S½ SW¼	15	54	12	558.45	
33	All	17	54	12	612	
34	E½ NE¼, SE¼ W¼, NE¼ SE¼ & Lots 2 & 5	19	54	12	257.20	
35	E½ NE¼, SW¼ NE¼, W½ & SE¼	21	54	12	600	
36	E½, E½ W½, NW¼ NW¼ & SW¼ SW¼	23	54	12	560	
37	All	25	54	12	640	
38	E½ & S½ SW¼	27	54	12	400	
39	E½ NE¼, NW¼ NE¼, NW¼ & NW¼ SW¼	29	54	12	320	
40	N½ NW¼	31	54	12	73.65	
41	SW¼ NE¼, SE¼ NW¼, N½ SW¼, SE¼ SW¼ & SE¼	33	54	12	360	
42	NE¼, E½ NW¼, SW¼ NW¼, N½ S½ & SW¼ SE¼	35	54	12	480	
43	SE¼ SW¼ & SW¼ SE¼	5	55	12	80	
44	N½ NE¼ & NW¼	7	55	12	248.89	
45	W½ SW¼, SW¼ SE¼, Lots 5, 7 & 8	9	55	12	189.55	
45	Lot 2	9	55	12	46.90	10343
46	S½ NE¼, SE¼ NW¼, E½ SW¼, N½ SE¼ & Lot 3	11	55	12	307.50	
47	SE¼ NE¼, W½ NE¼, NW¼ NW¼, NE¼ SW¼, S½ SW¼, & SE¼	13	55	12	440	
48	SE¼ NE¼ & S½, less R-W 10 acres	15	55	12	350	
49	SE¼ SW¼, Lots 3, 6, 11, 12 & 13,	19	55	12	261.90	
50	W½, NE¼, E½ W½, NW¼ NW¼, SW¼ SW¼, N½ SE¼, SE¼ SE¼	21	55	12	440	
51	E½, NW¼, E½ SW¼ & Lot 1, less R-W 9 acres	23	55	12	598.60	
52	E½, NW¼, N½ SW¼ & SW¼ SW¼	25	55	12	600	
53	N½ NW¼, NW¼ SW¼, Lots 1, 2, 6 & 8	27	55	12	249.70	
54	E½, E½ NW¼, SW¼ NW¼ & SW¼	29	55	12	578.10	

SCHEDULE A--2

LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railway Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(**Note**—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp. N	R. W	Area	Numbered Contract
55	N½ NE¼, E½ SW¼, W½ SE¼, SE¼ SE¼ & Lot 5	31	55	12	325.25	
56	SE¼ NE¼, W½ NE¼, W½ SE¼,	33	55	12	548.15	
57	NW¼, N½ SW¼, SE¼ & Lot 1	35	55	12	430.60	
58	SW¼ & SW¼ SE¼	1	51	13	200	
59	SE¼	17	51	13	160	
60	N½ & W½ SW¼	21	51	13	400	
61	E½ NE¼	23	51	13	80	
62	NE¼ NE¼ & NW¼ NW¼	1	52	13	92.43	
63	NE¼ NW¼ & W½ SW¼	3	52	13	124.62	
64	NW¼ NW¼	5	52	13	42.83	
65	NE¼, E½ NW¼, SW¼ NW¼ N½ SW¼, N½ SE¼, & SE¼ SE¼	7	52	13	473.12	
66	E½ E½, SW¼ NE¼ & NW¼ SE¼	9	52	13	240	
67	NE¼ SW¼ & S½ S½	11	52	13	200	
68	NE¼, NE¼ SE¼ & S½ SE¼	13	52	13	280	
69	NE¼, S½ NW¼, SW¼, W½ SE¼ & SE¼ SE¼	15	52	13	520	
70	S½ NW¼, N½ SW¼ & SE¼ SW¼	17	52	13	200	
71	S½ NE¼, NW¼ & S½	21	52	13	560	
72	NW¼ NE¼, NW¼, N½ SW¼ & SE¼	23	52	13	440	
73	NW¼	25	52	13	160	
74	N½, N½ SW¼, SW¼ SW¼ & N½ SE¼	27	52	13	520	
75	S½ SW¼ & SE¼	33	52	13	240	
76	N½ NE¼	35	52	13	80	
77	E½ NE¼, NW¼ NE¼, W½ NW¼, SE¼ NW¼, NE¼ SW¼ & NW¼ SE¼	1	53	13	314.78	
78	Lot 4	3	53	13	33.10	
79	NE¼ SW¼	5	53	13	40	
80	S½ NW¼, NE¼ SW¼, SE¼ SE¼, Lots 2, 4, 5, 6, 7	7	53	13	351.44	
81	Lot 2	9	53	13	33.84	
82	S½ NE¼, E½ SW¼ & NW¼ SE¼	11	53	13	200	
83	SE¼ SE¼	13	53	13	40	
84	SW¼ NE¼, NW¼ SE¼ & SE¼ SE¼	25	53	13	120	
85	W½ NW¼, SE¼ NW¼ NE¼ SW¼ & SE¼ SE¼	1	54	13	201.05	

SCHEDULE A--2

LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota, on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(**Note**—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp. N	R. W	Area	Numbered Contract
86	S½ SW¼,	3	54	13	80	
87	SE¼ NE¼,	5	54	13	40	
88	S½ NW¼, NW¼ SW¼ & W½ SE¼,	9	54	13	200	
89	NE¼ SE¼ & Lot 6,	11	54	13	72.50	
90	NW¼ NW¼, SE¼ SW¼, N½ SE¼ & SE¼ SE¼,	13	54	13	200	
91	NE¼ NE¼, W½ NE¼ & NW¼ SE¼,	15	54	13	160	
92	SE¼ NW¼, Lots 1 & 4,	19	54	13	132.21	
93	NE¼ SE¼, Lots 3 & 7,	21	54	13	89.10	
94	W½ NE¼, NE¼ NW¼ & SW¼ SE¼,	23	54	13	160	
95	NE¼, SE¼ NW¼, Lots 2, 4, 5, & 7,	25	54	13	290.55	
96	W½ NE¼, NE¼ NW¼, SW¼ NW¼ & W½ SW¼,	27	54	13	240	
97	SE¼ NE¼, SE¼ SW¼, SW¼ SE¼, Lots 1, 2, 5 & 7,	29	54	13	221.60	
98	S½ NE¼,	31	54	13	78.50	
99	E½ NE¼, NW¼ NE¼, SE¼ SW¼ & SW¼ SE¼	35	54	13	200	
100	SW¼ NE¼, N½ S½, SE¼ SW¼ &SW¼ SE¼,	1	55	13	280	
101	E½ NE¼, SW¼ NE¼, N½ NW¼, SW¼ NW¼, S½ SW¼, W½ SE¼ & NE¼ SE¼,	5	55	13	431.25	
102	E½ NE¼, SW¼ NE¼, SE¼ SW¼, W½ SE¼ & SE¼ SE¼,	7	55	13	280	
103	S½ NE¼, N½ NW¼, E½ SW¼ & NW¼ SE¼,	9	55	13	289	
104	SE¼ NE¼, W½ NW¼, SE¼ SW¼ & SE¼,	11	55	13	320	
105	N½ & SW¼ SE¼,	13	55	13	360	
106	N½ NE¼, NE¼ SE¼ & W½	15	55	13	440	
107	SE¼ NE¼, NW¼ & N½ SW¼,	17	55	13	280	
108	NW¼ NE¼ & N½ NW¼,	19	55	13	124.35	
109	E½ NE¼, SW¼ NE¼, E½ NW¼, NW¼, SW¼ NW¼, SW¼ & NE¼ SE¼,	21	55	13	440	
110	NW¼, N½ SW¼ & SW¼ SE¼,	23	55	13	280	
111	NE¼ SE¼, Lots 1, 2, 9 & 10,	25	55	13	206.35	

SCHEDULE A--2

LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp. N	R. W	Area	Numbered Contract
112	SE¼ NW¼, E½ SW¼ & N½ SE¼,	27	55	13	200	
113	NW¼ SE¼,	29	55	13	40	
114	Lot 3,	31	55	13	41.50	
115	E½ SE¼,	33	55	13	80	
116	N½ NE¼, SW¼ NE¼, E½ NW¼, NE¼ SW¼ & NW¼ SE¼,	35	55	13	280	
117	NE¼ & SW¼,	3	51	14	319.48	
118	NW¼ & E½ SW¼,	11	51	14	240	
119	SE¼	13	51	14	160	
120	W½ NW¼ & SE½ NW¼,	17	51	14	120	
121	NE¼	21	51	14	160	
122	SE¼	29	51	14	160	
123	NE¼ NW¼	1	52	14	42.04	
124	NW¼ NE¼ & Lot 1,	3	52	14	83.21	
125	E½ NE¼, N½ SW¼ & SW¼ SW¼,	5	52	14	201.55	
126	N½ NE¼ & E½ SE¼,	7	52	14	160	
127	NW¼ NW¼, NW¼ SW¼ & Lot 1,	9	52	14	127.12	
128	NW¼ NE¼, NE¼ NW¼ SE¼ SW¼ & S½ SE¼,	13	52	14	200	
129	W½ NE¼, SE¼ NE¼, S½ SW¼, SE¼ & Lot 4,	15	52	14	383.15	
130	NW¼ & Lot 5,	17	52	14	161.34	
131	NE¼, SE¼ NW¼, W½ NW¼ & SW¼,	19	52	14	441.68	
132	NE¼ & S½	23	52	14	480	
133	All	25	52	14	607.11	
134	N½ SE¼,	27	52	14	80	
135	E½ SW¼,	33	52	14	80	
136	S½ SW¼ & SE¼ SE¼,	35	52	14	120	
137	NE¼ & W½	3	53	14	449.86	
138	E½, NW¼, N½ SW¼ & SE¼ SW¼,	5	53	14	563.20	
139	W½ NE¼, SE¼ NE¼ & W½ NW¼,	7	53	14	205.97	
140	N½ N½, N½ S½, S½ SW¼, & & SW¼ SE¼,	9	53	14	440	
141	E½ NW¼ & SW¼ NW¼,	15	53	14	120	
142	N½ NE¼,	17	53	14	80	
143	SW¼ NE¼,	19	53	14	40	
144	NW¼ SW¼,	21	53	14	40	

SCHEDULE A--2

LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota, on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp. N.	R. W.	Area	Numbered Contract
145	NW¼ NE¼, E½ NW¼ & N½ SW¼,	29	53	14	200	
146	NE¼	31	53	14	160	
147	Island No. 1 & Lots 5, 6, & 7,	33	53	14	78.08	
148	S½ SW¼,	1	54	14	80	
149	SW¼ NW¼, S½ SW¼ & E½ SE¼,	3	54	14	200	
150	SW¼ NE¼, NW¼ SW¼ & NE¼ SE¼,	5	54	14	120	
151	SW¼ NE¼, SW¼ SW¼ & SW¼ SE¼,	7	54	14	118.92	
152	SE¼ NE¼,	9	54	14	40	
153	SE¼ SW¼,	13	54	14	40	
154	SE¼ SE¼,	15	54	14	40	
155	SW¼ NE¼, SE¼ SW¼, W½ SE¼ & SE¼ SE¼,	17	54	14	200	
156	W½ NE¼, NW¼, N½ SW¼, SW¼ SW¼ & N½ SE¼,	19	54	14	403.20	
157	SE¼ SE¼,	21	54	14	40	
158	SE¼ NW¼ & SE¼ SW¼,	23	54	14	80	
159	NE NE¼ & S½ N½,	25	54	14	200	
160	SW¼ SW¼,	27	54	14	40	
161	NE¼ NE¼,	29	54	14	40	
162	NW¼ NE¼, W½ SE¼ & SE¼ SE¼,	31	54	14	160	
163	W½ SE¼ & SE¼ SE¼,	33	54	14	120	
164	W½, NW¼ SE¼ & E½ SE¼,	35	54	14	440	
165	SE¼ SW¼, NE¼ SE¼ & Lots 1 & 4,	1	55	14	158.96	
166	S½ NE¼, E½ SW¼ & NW¼ SE¼,	5	55	14	200	
167	SW¼ NE¼ & Lot 2,	7	55	14	81.28	
168	SW¼ NE¼ & SW¼ NW¼,	9	55	14	80	
169	NW¼ SW¼,	11	55	14	40	
170	NW¼ NE¼, NE¼ SW¼, W½ SE¼ & NE¼ SE¼,	13	55	14	200	
171	NE¼ NE¼, SW¼ NE¼, SE¼ NW¼, W½ SW¼, SE¼ SW¼ & NE¼ SE¼,	15	55	14	280	
172	NW¼ NE¼ & SE¼ NW¼,	17	55	14	80	
173	W½ NE¼, E½ NW¼, W½ SW¼ & SW¼ SE¼,	21	55	14	280	
174	Lot 2,	23	55	14	32.25	

SCHEDULE A--2

LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp. N.	R. W.	Area	Numbered Contract
175	SW¼ NW¼,	25	55	14	40	
176	SE¼ NW¼,	29	55	14	40	
177	N½ NE¼ & NE¼ NW¼,	35	55	14	120	
178	N½ NW¼,	1	51	15	80.17	
179	N½ NE¼,	3	51	15	80.08	
180	SW¼ SE¼,	5	51	15	40	
181	NW¼ NE¼, NW¼ & NW¼ SW¼,	9	51	15	240	
182	E½ W½ & SW¼ SW¼,	11	51	15	200	
183	E½ NW¼, SW¼ NW¼ & S½,	15	51	15	440	
184	Lots 1 & 3,	1	52	15	35.30	
184	Lots 8 & 9,	1	52	15	74.03	8772
185	SW¼ NW¼, N½ SW¼ & SE¼ SE¼,	3	52	15	160	
186	Lots 6 & 7,	11	52	15	56.51	
187	W½ NE¼ & SE¼,	13	52	15	240	
188	SE¼ NE¼, Lots 1, 2, 3, & 4,	17	52	15	179.17	
188a	Lots 2, 6, 7 & 8,	19	53	15	152.92	
189	S½ NE¼, SE¼ NW¼, SW¼ SW¼ SE¼ SE¼,	23	52	15	200	
190	NE¼, E½ NW¼ & S½,	25	52	15	560	
191	NW¼ SW¼ & S½ SE¼,	27	52	15	120	17676
192	N½ N½,	31	52	15	158.97	
193	S½ NE¼, NE¼ SW¼, N½ SE¼ & SE¼ SE¼,	33	52	15	240	17676
194	NW¼	35	52	15	160	17676
195	NE¼ NE¼ & W½ NE¼, E½ NW¼ & N½ SW¼,	1	53	15	250.03	
196	S½ NE¼ & N½ SE¼,	3	53	15	160	
197	SE¼ NE¼	5	53	15	40	
198	W½ NE¼, SE¼ NE¼, W½ & SE¼,	7	53	15	596.88	
199	SE¼ NE¼, NE¼ NW¼, SE¼ SW¼ & N½ SE¼;	11	53	15	200	
200	Lot 1,	13	53	15	29.51	
201	NE¼ NE¼,	51	53	15	40	
202	S½ SW¼, N½ SE¼, SW¼ SE¼,	17	53	15	200	
203	NE¼ NE¼, SW¼ NE¼, NW¼ NW¼ & SW¼,	19	53	15	273.19	
204	N½ NE¼, SW¼ NE¼, SE¼ NW¼, N½ SW¼, NW¼ SE¼ & SE¼ SE¼,	21	53	15	320	
205	SE¼ NE¼	23	53	15	40	

SCHEDULE A--2

LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota, on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp. N.	R. W.	Area	Numbered Contract
206	SE¼ SW¼,	25	53	15	40	
207	SE¼ NE¼ & SE¼ SW¼,	27	53	15	80	
208	NE¼, S½ NW¼, N½ SW¼, SW¼ SW¼ & NW¼ SE¼,	29	53	15	400	
209	NE¼ NE¼, SE¼ NW¼ & N½ SW¼,	31	53	15	156.17	
210	E½ NE¼ & SW¼ NW¼,	33	53	15	120	
211	W½ NE¼, W½ NW¼, SE¼ NW¼, E½ SW¼ & SW¼ SE¼,	35	53	15	317.31	
212	NE¼ SW¼ & N½ SE¼,	1	54	15	120	
213	W½ NE¼, SE¼ NE¼, E½ NW¼, SW¼ NW¼, & S½,	3	54	15	569.07	
214	S½ NE¼, SE¼ NW¼ & S½ SW¼,	5	54	15	200	
215	All	7	54	15	611.48	
216	E½, NW¼, N½ SW¼ & SE¼ SW¼,	9	54	15	600	
217	N½ NE¼, SW¼ NE¼, SW¼ NW¼, NW¼ SW¼ & SE¼ SE¼,	11	54	15	240	
218	N½ NE¼, SW¼ NE¼ & W½,	15	54	15	440	
219	N½, NE¼, NW¼ NW¼ & S½ SE¼,	17	54	15	200	
220	N½ NE¼, NE¼ SW¼, NW¼ SE¼, Lots 3, 5, & 8,	19	54	15	239.56	
221	N½ NE¼, SW¼ NE¼, NE¼ SW¼, S½ SW¼, NW¼ SE¼, SE¼ SE¼, Lots 1, 3, 4 & 5,	21	54	15	427.60	
222	SE¼ NE¼, S½ NW¼, N½ SW¼, SW¼ SW¼ & W½ SE¼,	23	54	15	320	
223	E½ NE¼, & E½ SW¼,	25	54	15	160	
224	E½ NE¼, SW¼ NE¼ & S½ NW¼,	27	54	15	200	
225	NE¼ SW¼, SW¼ SW¼ & NW¼ SE¼,	29	54	15	120	
226	NE¼ NW¼ & Lot 4,	31	54	15	81.97	
227	SW ¼ SE¼,	33	54	15	40	
228	NW¼ SW¼,	35	54	15	40	
229	SW¼ SE¼,	3	55	15	40	
230	S½ SW,	7	55	15	80.18	
231	SW¼ NW¼, N½ SW¼ & NW¼ SE¼,	9	55	15	160	
232	SE¼ NE¼, NE¼ SE¼, Lots 1, 9 & 10,	11	55	15	196.28	

SCHEDULE A--2

LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp. N.	R. W.	Area	Numbered Contract
233	Lots 1, 2, 3, 4, 5, 6 & 7,	15	55	15	268.58	
234	E½ NE¼ & NE¼ SE¼,	17	55	15	120	
235	NE¼, NE¼, NW¼ NW¼, S½ N½, N½ S½ & S½ SE¼,	19	55	15	484.14	
236	N½ NE¼, SW¼ NE¼, S½ NW¼, N½ SW¼, Lots 2, 3, 4, 6 & 8,	21	55	15	401.39	
237	NE¼, S½ NW¼, SW¼ & N½ SE¼,	23	55	15	480	
238	SW¼ NW¼ & E½ SW¼,	25	55	15	120	
239	N½ NW¼, SE¼ SE¼, Lots 1 & 2,	27	55	15	199	
240	NE¼ NE¼, N½ NW¼, SW¼ NW¼, NE¼ SE¼, Lots 1, 4, 8 & 9,	29	55	15	302.90	
241	SW¼ SE¼,	31	55	15	40	
242	N½ SE¼,	35	55	15	80	
243	SE¼ NE¼ & NW¼ SE¼,	5	52	16	80	
244	NE¼ NW¼	9	52	16	40	
245	SW¼ NE¼, NE¼ SW¼, S½ SW¼, W½ SE¼, Lots 1, 2 & 3,	13	52	16	368.10	
246	E½ SW¼, SE¼, Lots 5, 6 & 8,	25	52	16	334.05	
247	Lots 1, 2 & SE¼ SE¼	1	53	16	117.83	
248	Lot 4,	5	53	16	36.85	
249	All.	1	54	16	627.76	
250	E½ NE¼ SW¼, SW¼ SW¼, Lots 5 & 6,	3	54	16	423.36	
251	Lot 9,	7	54	16	13	
252	SW¼ NW¼, Lots 1, 2 & 4,	9	54	16	175.75	
253	NE¼, E½ NW¼, SW¼ NW¼, NE¼ SW¼ & N½ SE¼,	11	54	16	400	
254	NE¼ NW¼, Lots 2 & 7,	13	54	16	120.25	
255	SE¼ SW¼,	15	54	16	40	
256	SW¼ NE¼,	17	54	16	40	
257	Lot 8,	19	54	16	.50	
258	S½ N½, NE¼ SW¼, NW¼ SE¼ & SE¼ SE¼,	23	54	16	280	
259	NE¼ NE¼,	25	54	16	40	
260	NE¼ SW¼,	31	54	16	40	
261	N½ NW¼ & SE ¼NW¼	35	54	16	120	
262	S½ NE¼, SW¼ NW¼, N¼ S½ & SE¼ SE¼,	13	55	16	320	
263	S½ SW¼,	15	55	16	80	
264	S½ S½	17	55	16	160	
265	E½ SE¼,	19	55	16	80	

SCHEDULE A--2

LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota, on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(**Note**—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp.	R.	Area	Numbered Contract
266	NW¼ NW¼, S½ N½ & SW¼,...	21	55	16	337	
267	N½ NE¼, SE¼ NE¼, N½ NW¼, SW¼ NW¼, NW¼ SW¼ & S½ S½, ...	23	55	16	440	
268	NW¼ NE¼ & N½ NW¼,.....	25	55	16	120	
269	N½ NE¼, SW¼ NE¼ & NW¼,..	27	55	16	280	
270	NE¼ SW¼, Lots 1, 2, 3, 7, 8 & 10,	29	55	16	216.75	
271	SE¼ SE¼, & Lot 3,.....	33	55	16	76.25	
272	All	35	55	16	468	
273	Lot 2, ...	3	53	17	27.48	
274	SE¼ NE¼, SE¼ NW¼, E½ SW¼ & S½ SE¼, ...	5	53	17	240	
275	N½ N½ & SE¼ NW¼,.....	9	53	17	200	
276	NE¼, E½ NW¼, SW¼ NW¼, SW¼ SE¼, & E½ SE¼,.....	11	53	17	400	
277	S½ NE¼, SE¼ NW¼, NE¼ SW¼ & N½ SE¼, ...	13	53	17	240	
278	NW¼ NE¼, SE¼ NE¼, W½ SE¼, & SE¼ SE¼, ...	15	53	17	200	
279	W½ NW¼ & S½.....	25	53	17	400	
280	Lot 2, ...	5	54	17	34.92	
281	Lots 1 & 2, ...	7	54	17	71.49	
282	Lots 1, 2, 3, 4, 5, 6, 7, 8 & 9,.....	9	54	17	298.75	
283	Lots 3 & 4, ...	11	54	17	76.50	
284	SW¼ SW¼, ...	13	54	17	40	
285	Lots 1, 2, 3, 6, 7, 8 & 9,.....	17	54	17	261.50	
286	S½ NE¼, SE¼ SW¼, W½ SE¼, SE¼ SE¼, Lots 1, 2, 3, & 4,.....	13	55	17	359.50	
287	N½ NW¼, Lots 1 & 2,.....	23	55	17	157.20	
288	E½ SE¼, ...	33	55	17	80	
289	Lots 1, 2, 3, & NE¼ NW¼,.....	7	53	18	99.78	
290	N½ NW¼, ...	17	53	18	80	
291	SW¼ SW¼, ...	3	54	18	40	
292	NE¼ NE¼ & SE¼ SE¼,.....	9	54	18	80	
293	N½ NW¼, SE¼ NE¼, S½ SW¼, NE¼ SE¼ & SW¼ SE¼,.....	13	54	18	280	
294	NE¼ NE¼, NW¼ SE¼ & SE¼ SE¼, ...	15	54	18	120	
295	SE¼ SW¼ & SW¼ SE¼,.....	17	54	18	80	
296	E½ SE¼, ...	19	54	18	80	6222
297	NW¼ SW¼, ...	21	54	18	40	
298	NW¼ NW¼, S½ SW¼ & W½					

SCHEDULE A--2

LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp.	R.	Area	Numbered Contract
	SE¼,	23	54	18	200	
299	SW¼ NE¼, NW¼ NW¼, SE¼ NW¼ & NE¼ SW¼,	25	54	18	160	
300	N½ NW¼ & NW¼ SE¼,	29	54	18	120	
301	NE¼ NW¼,	35	54	18	40	
302	S½ SW¼,	19	55	18	75.17	
303	NW¼ NE¼ & NW¼,	33	55	18	200	
304	SE¼ NE¼, NE¼ SE¼, Lots 4, 5 & 6,	5	52	19	152.59	
305	SE¼ NW¼, E½ SW¼, Lots 1, 2, 4, 5, 6, 7 & 8,	7	52	19	289.39	
306	NW¼,	9	52	19	160	
307	Lot 7,	13	53	19	39.55	
308	SW¼ SE¼,	15	53	19	40	
309	E½ SE¼,	17	53	19	80	
310	E½ NW¼, NW¼ SE¼, Lots 3 & 4,	19	53	19	196.40	
311	SW¼ SW¼,	25	53	19	40	
312	S½ SE¼, Lots 1, 3, 4, 6, 7, 8, 9, & 10,	27	53	19	294.65	
313	W½ W½,	29	53	19	160	
314	SE¼ NW¼, NE¼ SW¼, Lots 1, 2, 3, 4, & 6,	31	53	19	244.95	
315	NE¼ SW¼, SE¼ SE¼, Lots 1, 2, 3, 4, 6, & 7,	33	53	19	309.50	
316	NW¼ NW¼, SE¼ NW¼, NW¼ SE¼, Lots 6 & 9,	5	54	19	194.60	
317	All	7	54	19	626.40	
318	E½ E½, W½ NW¼, NW¼ SW¼, Lots 1, 2, 3, 4, 5, 6, 7, & 8,	17	54	19	580.45	
319	SE¼, NW¼ SW¼ & S½ SW¼,	21	54	19	280	
320	SW¼ NW¼,	27	54	19	40	
321	E½ NE¼, E½, SW¼, Lots 1, 4, 5, 6, 7 & 8,	29	54	19	362.60	
322	SE¼ SE¼,	31	54	19	40	
323	NE¼ NE¼, NW¼ & NW¼ SE¼,	33	54	19	239.75	
324	Lots 6 & 7,	15	55	19	53.85	17311
324	Lots 13,	15	55	19	.05	
325	E½ SE¼ & SW¼ SE¼,	21	55	19	120	
325	Lots 1, 2, & SE¼ NE¼,	21	55	19	64.50	2155
326	NW¼ NW¼,	25	55	19	40	
327	SW¼ NE¼, SE¼ NW¼, NE¼					

SCHEDULE A--2

LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota, on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

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Item Number	DESCRIPTION OF LAND	Sec.	Tp. N.	R. W.	Area	Numbered Contract
	SW¼ & NE¼ SE¼,	27	55	19	160	
328	Lot 6,	29	55	19	.30	15795
329	SE¼ NE¼, SE¼, Lots 3, 5, 6 & 9,	31	55	19	333.92	
330	W½ E½, W½ & SE¼ SE¼,	33	55	19	520	
331	NE¼ NE¼ & S½ NW¼,	35	55	19	120	
332	SE¼ NW¼ & Lots 3, 4, 5, 6, 7, 8 & 9,	5	51	20	208.95	
333	W½ NE¼, Lots 2, 3, & 4,	7	51	20	184.91	
333	E½ NW¼,	7	51	20	80	17743
334	S½ SE¼,	1	52	20	80	
335	Lot 4,	7	52	20	50.15	
336	SE¼ SW¼, Lots 1, 2, 3, 5, 6, 7 & 8,	13	52	20	289.55	
337	S½ N½ & N½ S½,	23	52	20	320	
338	SW¼ SE¼,	29	52	20	40	
339	S½ SE¼,	1	53	20	80	
340	E½ SW¼ & SE¼,	19	53	20	240	
341	W½ SW¼,	21	53	20	80	
342	NW¼, E½ SW¼ & W½ SE¼,	23	53	20	320	
343	S½ NE¼, N½ SW¼, SE¼ SW¼ & SE¼,	1	54	20	360	
344	SE¼ NE¼ & NE¼ SE¼	5	54	20	80	
345	SE¼ SE¼,	9	54	20	40	
346	NE¼ NW¼, S½ NW¼ & SE¼ SE¼,	13	54	20	160	
347	SE¼ SW¼,	33	54	20	40	
348	S½ N½, SE¼ SW¼, NE¼ SE¼ & S½ SE¼,	13	55	20	320	
349	S½ NE¼ & W½ SE¼,	15	55	20	160	
350	NW¼ NW¼	23	55	20	40	
351	SW¼ SW¼,	1	51	21	40	16195
351	SE¼ SW¼,	1	51	21	40	16284
352	SW¼ SE¼,	3	51	21	40	
353	NE¼ SE¼,	7	51	21	40	
354	NE¼ NE¼ & SE¼ SE¼,	9	51	21	80	
355	E½ NE¼,	11	51	21	80	17428
355	S½ SE¼,	11	51	21	80	17735
355	W½ NE¼, E½ NW¼, SW¼ NW¼, SW¼ & N½ SE¼,	11	51	21	440	
356	W½ NE¼, NW¼, N½ SW¼, SW¼ SW¼ & NW¼ SE¼,	13	51	21	400	
357	N½, N½ SW¼, SW¼ SW¼, & SW¼ SE¼,	15	51	21	480	

SCHEDULE A--2

LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railway Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(Note—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp. North	R. West	Area	Numbered Contract
358	SE¼,	17	51	21	160	
359	SW¼, N½ SE¼ & SW¼ SE¼	19	51	21	275.16	
360	NW¼ NW¼,	21	51	21	40	
361	Lot 1,	31	51	21	42.15	
362	NE¼ NE¼,	33	51	21	40	
363	W½ SE¼ & SE¼ SE¼,	7	52	21	120	
364	N½ NE¼, less R-W	17	52	21	80	
365	NE¼ NW¼,	27	52	21	40	
366	W½ SW¼,	29	52	21	80	
367	NE¼ NE¼,	31	52	21	40	
368	SW¼ SW¼,	3	53	21	40	
369	E½ SW¼, SE¼, Lots 1, 2, 3, & 4,	5	53	21	361.44	
370	S½ NE¼,	7	53	21	80	
371	SW¼ SW¼,	9	53	21	40	
372	NE¼ & NE¼ [illegible] ¼,	11	53	21	200	
373	S½ NE¼, E½ NW¼, SW¼ NW¼ & NW¼ SE¼,	15	53	21	400	
374	W½ NE¼ ¼,	17	53	21	80	
375	NE¼, SE¼ NW¼ & N½ SE¼,	21	53	21	280	
376	NE¼ NW¼, SE¼ SW¼, W½ SE¼ & SE¼ SE¼,	23	53	21	200	
377	E½, NW¼ & NE¼ SW¼	35	53	21	520	
378	S½ SE½,	35	53	21	80	
379	NE¼ & NW¼ SE¼	5	54	21	197.29	
380	E½, SE¼ NW¼, Lots 4 & 5,	7	54	21	440.55	
381	SE¼ NW¼,	21	54	21	40	
382	W½ SW¼,	27	54	21	80	
383	NW¼ NE¼, NW¼ NW¼, NW¼ SW¼ & NW¼ SE¼,	31	54	21	160.63	
384	SW¼ NE¼, SE¼ SW¼ & SW¼ SE¼,	33	54	21	126	
385	SE¼ SW¼ & Lot 6,	21	55	21	40.30	
386	NE¼ SW¼, NW¼ SE¼, S½ S½, Lots 1, 5, 6 & 7,	29	55	21	366.65	
386	Lots3, 4 & NW¼ SW¼,	29	55	21	120.55	1234
387	S½ SE¼,	31	55	21	80	
387	Lots 1 & 2,	31	55	21	78.65	1234
388	S½ SW¼, Lots 3, 4, & 5,	33	55	21	182	1234

389 All the patented or selected lands and rights in respect of such lands of the Northern Pacific Railroad Company in the said County of St. Louis, State of Minnesota, whether specified in the foregoing list or not, will be included in such sale.

SCHEDULE A--2

LIST

of patented and selected lands of the Northern Pacific Railroad Company to be sold under the decree of sale entered on the 25th day of May, 1899, in the United States Circuit Court for the Eastern District of Wisconsin, in the cause wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company and others are defendants; and a certain other decree ancillary thereto entered in a like cause pending between said parties in the United States Circuit Court for the District of Minnesota, on the 5th day of June, 1899.

Lands in the State of Minnesota, County of St. Louis.

(**Note**—Lands affected by outstanding contracts of sale are indicated by contract number opposite thereto.)

Item Number	DESCRIPTION OF LAND	Sec.	Tp.	R.	Area	Numbered Contract
390	All lands within the County of St. Louis in the State of Minnesota, granted by the Congress of the United States to aid in the construction and equipment of the railroads of the Northern Pacific Railroad Company, for which patents have not issued and which have not been selected by and certified to said railroad company, but to which said railroad company is entitled under said grants of Congress, and all rights of said railroad company, to receive from the United States any lands within said county and state, which have not been certified or patented to said railroad company, whether under the grant expressed in the act of Congress of July 2, 1864, or under any subsequent grant by way of indemnity or otherwise to said railroad company together with all the right, title, interest and claim in or to any such lands, and all its rights to receive from the United States patents therefor; and also all mineral and other reservations and exceptions of every nature and description contained in any conveyance or contract in respect of lands within said County and State at any time made by said Railroad Company or its Receivers, or otherwise, and all rights, benefits, equity of redemption, title, interest or claim of said Railroad Company thereunder, and in and to all lands granted to it by the Congress of the United States within said County and State, and which may not be included in the sale under said decrees under the foregoing descriptions of lands, for which letters patent have issued to said Railroad Company and the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said Company, whether or not such lands are now held by or have been heretofore sold, or contracted to be sold, by said Railroad Company or such Receivers, or are claimed to have been sold under judicial proceedings or for non-payment of taxes, or for any cause soever, and whether or not the same stand in the name of the said Railroad Company; it being the intention to include every possible right, title and interest of said Railroad Company in and to any of the lands within said county and state covered by any grant to said Railroad Company by the Congress of the United States, and which may not be included in the sale under said decrees under the foregoing description of lands for which letters patent have issued to said Railroad Company, and the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said Company; all subject, however, to a certain mortgage or deed of trust, dated the 1st day of January, 1881, known as the General First Mortgage of said Northern Pacific Railroad Company, and executed by it to the Central Trust Company of New York, as Trustee.					

259 Defendant's Exhibit No. 7.

Introduced in evidence at page 148 of this Record.

Special Master's & Receiver's Deed.

An indenture, made the 22nd day of September, in the year one thousand eight hundred and ninety-nine, between Alfred L. Cary, as Special Master, appointed as such by the Circuit Court of the United States for the Eastern District of Wisconsin, in the cause in equity, and by the Circuit Courts of the United States in other districts in causes ancillary thereto as hereinafter mentioned, party of the first part; Edwin H. McHenry and Frank G. Bigelow as Receivers of the Northern Pacific Railroad Company, a corporation created by an act of Congress of the United States, approved July 2, 1864, parties of the second part, and Northern Pacific Railway Company, a railroad corporation organized and existing under the laws of the State of Wisconsin, party of the third part:

Whereas, at the January term, A. D. 1896, of the Circuit Court of the United States for the Eastern District of Wisconsin—to-wit, on the 25th day of May, 1896—in a certain cause in equity pending therein, wherein The Farmers' Loan and Trust Company is complainant and the Northern Pacific Railroad Company, Phillip B. Winston, George R. Sheldon, William S. P. Prentice and William C. Sheldon, Jr., surviving partners of the firm of William C. Sheldon & Company, and others are defendants, a certain sequestration decree was entered whereby the said Edwin H. McHenry and Frank G. Bigelow were appointed Receivers of certain lands, assets, prop-
260 erty and effects, real and personal, of the said Northern Pacific Railroad Company, including the lands, rights to lands and property hereinafter mentioned and described, and all of which the said defendant Northern Pacific Railroad Company, was, by said decree, ordered to forthwith convey unto said Receivers as such, their successors and assigns.

And whereas, certain decrees ancillary to that above mentioned and of like character, force and effect, were afterwards entered in like causes pending between the same parties in the Circuit Courts of the United States for the following districts, viz: In the District of Minnesota and in the District of North Dakota.

And whereas, at the January term, A. D. 1899, of the said Circuit Court of the United States for the Eastern District of Wisconsin—to-wit: On the 25th day of May, 1899—in said cause in equity pending therein, it was, among other things, ordered and decreed by said Court (1) that all the lands granted by Congress to aid in the construction and equipment of the

railroads of the defendant, the Northern Pacific Railroad Company, and all rights of said defendant under the several land grants made to it by Congress in any such lands lying within the State of Minnesota and State of North Dakota east of the Missouri River, should be sold at public sale to the highest bidders in the manner specified in said decree;

(2) that such sales should be made by Alfred L. Cary, Esq., who was thereby appointed Special Master for that purpose; (3) that all of said lands for which letters patent had issued to said defendant, Northern Pacific Railroad Company, and the right to receive lands for which letters patent had not issued but which had been selected by and certified
261 to said company, should be sold in single sections or subdivisions thereof; (4) that all lands for which patents had not issued and which had not been selected by and certified to said company, but to which said Northern Pacific Railroad Company was entitled under said grants of Congress, and all rights of said Northern Pacific Railroad Company to receive from the United States any lands which had not been certified or patented to said railroad company, whether under the grant expressed in the act of Congress of July 2, 1864, or under any subsequent grant, by way of indemnity of otherwise, to said company, together with all the right, title, interest and claim in or to any such lands, and all its rights to receive from the United States patents therefor, and also all right, title, interest and equity in and to any other lands to which the said Northern Pacific Railroad Company might be entitled and which might have accrued or should thereafter accrue to it under any of said land grants, and also all right, title, equity and interest in and to any lands covered by or included in any of said land grants and not thereinbefore specified, should be sold in one parcel as to such lands and rights in each county named in said decree and at the place in each such county designated in said decree; (5) that the Receivers appointed by said Court in said cause were, by said decree required to file schedules showing the lands and rights to be sold under said decree with the Clerk of said Court and with the Clerks of the United States Circuit Court for the Districts of Minnesota and North Dakota respectively, at least thirty days before the date of the first sale to be made under said decree; (6) that such sales should respectively be made upon a day or days to be
262 fixed by said Special Master, and notice of the times and places of said sales, describing the property and rights to be sold and referring to said decree, should be published respectively once a week for at least four weeks prior to such sales, respectively, in a newspaper printed, regularly issued and having a general circulation in the county and state

where said sales, respectively, were to be made as provided and designated in said decree.

And whereas, certain decrees ancillary to that of May 25th, 1899, above mentioned and of like character, force and effect were entered June 5th, 1899, in like causes pending between the same parties in the Circuit Courts of the United States for the following districts, viz: in the District of Minnesota and in the District of North Dakota.

And whereas, said party of the first part, in pursuance of said decrees and a notice of sale given by him as required by said decrees, did, at one of the places and in one of the counties specified in said decrees as at and in which one of said sales was to be made, to-wit: at the Court House at Duluth in the County of St. Louis and State of Minnesota, and at the time specified in said notice of sale for the sale in said county, offer at public sale all the lands within said county granted by congress to aid in the construction and equipment of the railroad of the Defendant, Northern Pacific Railroad Company, and all rights of said defendant under the several land grants made to it by Congress in any such lands lying within said county, due notice of the time and place of such sale having been given pursuant to said decrees and ac-
263 cording to law, and the said decrees having been complied with in all things touching and relating to said sale.

And Whereas, at such sale all of said lands within said County of St. Louis and State of Minnesota, for which letters patent had issued to said defendant, Northern Pacific Railroad Company, and the right to receive lands for which letters patent had not issued but which had been selected by and certified to said Company, were offered and sold in single sections or subdivisions thereof, and were struck off to the said party of the third part for the respective sums set forth in the schedule marked A 2 (except as to the lands represented by "Item Number" 390 in said schedule) annexed to the reports of such sales made by said party of the first part and hereinafter referred to, such sums being the highest sums bidden respectively therefor.

And Whereas, at such sale, all of said lands within the County of St. Louis, in the State of Minnesota, for which patents had not issued and which had not been selected by and certified to said Northern Pacific Railroad Company, but to which said railroad company was entitled under said grants of congress, and all rights of said railroad company to receive from the United States any lands within said county and state

which had not been certified or patented to said railroad company, whether under the grant expressed in the act of congress of July 2, 1864, or under any subsequent grant by way of indemnity or otherwise, to said railroad company, together with all the right, title, interest and claim in or to any such lands and all its rights to receive from the United States,
264 patents therefor, and also all mineral and other reservations and exceptions of every nature and description contained in any conveyance or contract in respect of lands within said county and state at any time made by said railroad company or its Receivers or otherwise, and all rights, benefits, equity of redemption, title, interest or claim of said railroad company thereunder, and in and to all lands granted to it by the Congress of the United States within said county and state and which might not be included in the sale under said decrees under the foregoing description of lands for which letters patent had issued to said railroad company, and the right to receive lands for which letters patent had not issued, but which had been selected by and certified to said company, whether or not such lands were then held by or had been therefore sold or contracted to be sold by said railroad company or such Receivers, or were claimed to have been sold under judicial proceedings, or for non-payment of taxes or for any cause soever, and whether or not the same stood in the name of said railroad company, it having been the intention to include every possible right, title and interest of said railroad company in and to any of the lands within said county and state covered by any grant to said railroad company by the Congress of the United States, and which might not be included in the sale under the said decrees under the foregoing description of lands for which letters patent had issued to said railroad company and the right to receive lands for which letters patent had not issued, but which had been selected by and certified to said Company, all subject, however, to a certain mortgage or deed of trust dated the first day
265 day of January, 1881, known as the General First Mortgage of said Northern Pacific Railroad Company, and executed by it to the Central Trust Company of New York as trustee, were offered and sold in one parcel and were struck off to said party of the third part for the sum specified in said Schedule A 2 of said reports of sales as the amount at which the lands and rights represented by "Item Number" 390 of said schedule were struck off, such sum being the highest sum bidden therefor.

And Whereas, the said sales with respect to such of the lands sold as had theretofore been contracted to be sold by the Northern Pacific Railroad Company or by its Receivers, were

made subject to the rights of the purchasers under said contracts.

And Whereas, said party of the first part, as such Special Master, did duly make his reports of said sales to and file the same with the said Circuit Court of the United States for the Eastern District of Wisconsin, on the 25th day of August, 1899, and also to and with the said Circuit Court of the United States for the District of Minnesota, on the 26th day of August, 1899, which said reports and the sales therein reported were, upon due notice to all parties, duly confirmed by the decrees of said Circuit Courts, respectively, entered on the following dates, viz., in the Eastern District of Wisconsin, on the 16th day of September, 1899, and in the District of Minnesota, on the 20th day of September, 1899.

And Whereas, in and by said decrees of confirmation, the said Special Master was authorized to sign, seal, execute and deliver to the said party of the third part deeds of conveyance and assignments, conveying to it all and singular the property, premises and rights of every kind and de-
266 scription so sold as aforesaid pursuant to the terms and conditions of such sale, and said Receivers were also ordered to make conveyances and assignments to the said party of the third part, its successors or assigns, of said lands and rights to and in respect of land.

And Whereas, said party of the third part has fulfilled all the terms of purchase and made full payment of such bids as provided by such decrees.

Now Therefore, this Indenture Witnesseth, that said Alfred L. Cary as such special Master, party of the first part, in order to carry into effect the sales made by him as aforesaid to the party of the third part in pursuance of the said decrees and in conformity to law and in consideration of the premises and of the prices and sums so bidden as aforesaid by the said party of the third part and by it to him paid, amounting in the aggregate to the sum of One Hundred Seventeen Thousand Seven Hundred Dollars, the receipt whereof is hereby acknowledged, and the said Edwin H. McHenry and Frank G. Bigelow, as such Receivers, parties of the second part, pursuant to the authority and direction to them given in and by said several decrees as hereinbefore recited and by reason of the premises and for the consideration hereinbefore expressed, have granted, bargained, sold, assigned, aliened, released, conveyed and confirmed, and the said parties of the first and second parts by these presents do grant, bargain, sell, alien, release, conveyed and confirm unto the said Northern Pacific Railway Company, party of the third part hereto, and to its successors and as-

signs, forever, the following described property em-
267 braced and included in said decrees and thereunder and thereby authorized and directed to be sold, viz:

All lands within the said County of St. Louis, in the said State of Minnesota, granted by the Congress of the United States to aid in the construction and equipment of the railroads of the Northern Pacific Railroad Company, for which letters patent have issued to said railroad company, and the right of said railroad company to receive the lands within said last mentioned county under said grants of Congress for which letters patent have not issued, but which have been selected by and certified to said company, being all the lands and rights in respect of lands described and set forth in said schedule marked A2, annexed to and forming part of said Special Master's reports to the said Circuit Courts of the United States of sales in said State of Minnesota, and filed in the offices of the clerks of said courts as aforesaid, except the lands and rights represented by "Item number" 390, in said schedule, together with all the right, title interest, benefit, claim and demand of said Northern Pacific Railroad Company, and the receivers thereof, in, to, under or by reason of the certain contracts made by said company or receivers for the sale of certain of said lands designated upon said schedule by a specific number as to the portions of said lands covered thereby, and all moneys due and to grow due thereunder.

Also all lands within the said County of St. Louis, in the said State of Minnesota, granted by the Congress of the United States to aid in the construction and equipment of the railroads of the Northern Pacific Railroad Company, for which patents have not issued, and which have not been selected by and certified to said railroad company, but to which said railroad company is entitled under said grants of Congress, and all rights of said railroad company to receive from the United States any lands within said county and state, which, have not been certified or patented to said railroad company, whether under the grant expressed in the act of Congress of July 2, 1864, or under any subsequent grant, by way of indemnity or otherwise, to said railroad company, together with all the right, title, interest and claim in or to any such lands, and all its rights to receive from the United States patents therefor, and also all mineral and other reservations and exceptions of every nature and description contained in any conveyance or contract in respect of lands within said county and state at any time made by said railroad company or its receivers or otherwise, and all rights, benefits, equity of redemption, title, interest or claim of said railroad company thereunder, and in and to all lands

granted to it by the Congress of the United States within said county and state and which may not be included in the sale under said decrees under the foregoing description of lands for which letters patent have issued to said railroad company, and the right to receive lands for which letters patent
268 have not issued but which have been selected by and certified to said company, whether or not such lands are now held by or have been heretofore sold or contracted to be sold by said railroad company or such receivers, or are claimed to have been sold under judicial proceedings or for non-payment of taxes or for any cause soever, and whether or not the same stand in the name of said railroad company; it being the intention to include every possible right, title and interest of said railroad company in and to any of the lands within said county and state covered by any grant to said railroad company by the Congress of the United States and which may not be included in the sale under said decrees under the foregoing description of lands for which letters patent have issued to said railroad company, and the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said company, all subject, however, to a certain mortgage or deed of trust dated the first day of January, 1881, known as the General First Mortgage of said Northern Pacific Railroad Company and executed by it to the Central Trust Company of New York as trustee.

To have and to hold, all and singular, the above mentioned and described property and premises hereby conveyed or intended so to be, unto the said party of the third part, its successors and assigns, to its and their own proper use, benefit and behoof, forever.

Subject, however, with respect to such of the lands hereinbefore described as have heretofore been contracted to be sold by the Northern Pacific Railroad Company or by its receivers, to the rights of the purchasers under said contracts.

In witness whereof, the said Alfred L. Cary, as such Special Master, party of the first part, and the said Edwin H. McHenry and Frank G. Bigelow, as such receivers, parties of the second part, have hereunto set their hands and seals the day and year first above written.

[Seal] ALFRED L. CARY,
As Special Master.

[Seal] FRANK G. BIGELOW,
As one of the Receivers of The Northern Pacific Railroad Company.

[Seal] EDWIN H. McHENRY,
As one of the receivers of the Northern Pacific Railroad Company.

Signed, sealed and delivered in presence of:

Edward J. Paul.
269 John W. B. VanHouten,

As to signatures of Alfred L. Cary and Frank G. Bigelow.

W. F. Von Deyn.
Earl L. Marvin.
As to signature of Edwin H. McHenry.

Internal Revenue Stamps in the sum of $118.00 are hereunto affixed and cancelled.

State of Wisconsin,
County of Milwaukee—ss.

On this 23rd day of September, A. D. 1899, before me personally appeared Alfred L. Cary, to me known to be one of the persons described in and who executed the foregoing instrument as Special Master, and also known to me to be Special Master as therein described, and acknowledged to me that he executed said instrument as his free act and deed as such Special Master, for the uses and purposes therein mentioned and contained.

In witness whereof, I have hereunto set my hand and seal of office as Notary Public in and for the State of Wisconsin, at the City of Milwaukee, in said County of Milwaukee and State of Wisconsin, this 23rd day of September, 1899.

EDWARD J. PAUL,
Notary Public.
Residing in Milwaukee County, Wisconsin.

270 State of Wisconsin,
County of Milwaukee—ss.

On this 23rd day of September, A. D. 1899, before me personally appeared Frank G. Bigelow, to me known to be one of the persons described in and who executed the foregoing instrument as one of the receivers of the Northern Pacific Railroad Company and also known to me to be one of said receivers as therein described, and acknowledged to me that he executed said instrument as his free act and deed as such receiver, for the uses and purposes therein mentioned and contained.

In witness whereof, I have hereunto set my hand and seal of office as Notary Public in and for the State of Wiscon-

sin, at the City of Milwaukee, in said County of Milwaukee and State of Wisconsin, this 23rd day of September, 1899.

EDWARD J. PAUL,
Notary Public.
Residing in Milwaukee County, Wisconsin.

State of Minnesota,
County of Ramsey—ss.

On this 25th day of September, A. D. 1899, before me personally appeared Edwin P. McHenry, to me known to be one of the persons described in and who executed the foregoing instrument as one of the receivers of the Northern Pacific Railroad Company, and also known to me to be one of said receivers as therein described, and acknowledged to me that he executed said instrument as his free act and deed as such receiver, for the uses and purposes therein mentioned and contained.

271 In Witness Whereof, I have hereunto set my hand and seal of office as Notary Public in and for the State of Minnesota, at the City of St. Paul, in said County of Ramsey and State of Minnesota, this 25th day of September, 1899.

W. F. VON DEYN.
Notary Public.
Residing in Ramsey County, Minnesota.

Endorsed: Defendant's Exhibit No. 7. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

272 Defendant's Exhibit No. 8.

This indenture, made this 21st day of December, A. D. 1899, by and between the Northern Pacific Railroad Company, a corporation created by and existing under and by virtue of an act of the congress of the United States of America entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific Coast, by the northern route," approved July 2, 1864, party of the first part, and the Northern Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, party of the second part, Witnesseth:

Whereas, at the January term A. D. 1899 of the Circuit court of the United States for the eastern district of Wisconsin, to-wit, on the 25th day of May, 1896, in a certain cause in

equity pending therein, wherein the Farmer's Loan & Trust Company is complainant, and the Northern Pacific Railroad Company, Phillip B. Winston, George R. Sheldon, William S. P. Prentice and William C. Sheldon, Junior, surviving partners of the firm of William C. Sheldon & Company, and others, are defendants, a certain sequestration decree was entered whereby Edwin H. McHenry and Frank G. Bigelow were appointed receivers of certain lands, assets, property and effects, real and personal of the said Northern Pacific Railroad Company, including the lands, rights to lands and property hereinafter mentioned and described; and

273 Whereas, certain decrees ancillary to that above mentioned, and of like character, force and effect were afterward entered in like causes pending between the same parties in the circuit courts of the United States for the following districts, viz: in the district of Minnesota and in the district of North Dakota; and

Whereas, at the January term A. D. 1899 of the said circuit court of the United States for the eastern district of Wisconsin, to-wit, on the 25th day of May, 1899, in said cause in equity pending therein, it was, among other things, ordered and decreed by said court that all the lands granted by congress to aid in the construction and equipment of the railroads of the defendant, the said Northern Pacific Railroad Company, and all rights of the said defendant under the several land grants made to it by congress in any such lands lying within the state of Minnesota and the state of North Dakota, east of the Missouri River, should be sold at public sale to the highest bidder in the manner specified in said decree, and that such sale should be made by Alfred L. Cary, Esquire, who was thereby appointed special master for that purpose; and

Whereas, certain decrees ancillary to that of May 25, 1899, above mentioned, and of like character, force and effect were entered on June 5, 1899, in like causes pending between the same parties, in the circuit courts of the United States for the following districts, viz: the district of Minnesota and the district of North Dakota; and

Whereas, the said Alfred L. Cary, Esquire, so appointed special master as aforesaid, in pursuance of said decrees and notices of sale given by him as required by said decrees, did, at the places specified, in said decrees and at the
274 times specified in said notices of sale, offer at public sale all the lands in the State of Minnesota and in the State of North Dakota, east of the Missouri River, granted by congress to aid in the construction and equipment

of the railroads of the said Northern Pacific Railroad Company, and all rights of the said Northern Pacific Railroad Company under the several land grants made to it by congress in any such lands lying within the said state of Minnesota and said state of North Dakota east of the Missouri River; and

Whereas, at such sales all of the said lands and rights to such lands so granted to the said Northern Pacific Railroad Company were offered and sold as required by said decree, and were struck off to the said Northern Pacific Railway Company, the party of the second part hereto, as the highest and best bidder therefor; and

Whereas, the said Alfred L. Cary, Esquire, as such special master, did thereafter duly make his report of the said sales to, and file the same with, the said circuit court of the United States for the eastern district of Wisconsin on the 25th day of August, 1899, and also to and with the circuit court of the United States for the district of Minnesota on the 26th day of August, 1899, and also to and with the said circuit court of the United States for the district of North Dakota on the 28th day of August, 1899, which said reports and the sales therein reported were duly confirmed by the decrees of the said circuit courts respectively, entered on the following dates, viz: in the eastern district of Wisconsin on the 16th day of September, 1899, in the district of Minnesota on the 20th day of September, 1899,
and in the district of North Dakota on the 21st day
275 of September, 1899; and

Whereas, in and by said decrees of confirmation the said special master was authorized to sign, seal, execute and deliver to the said Northern Pacific Railway Company deeds of conveyance, conveying to it all and singular the property, premises and rights of every kind and description so sold as aforesaid, pursuant to the terms and conditions of such sale; and said Edwin H. McHenry and Frank G. Bigelow, as such receivers, were also ordered to make conveyances to the said Northern Pacific Railway Company of the said lands and rights to and in respect of land; and

Whereas, said special master and said receivers have, in pursuance of said decrees, signed, sealed, executed and delivered to the said Northern Pacific Railway Company, the said conveyances thereby authorized; and

Whereas, in and by said decrees of confirmation it was further ordered and decreed that by way of further assurance and confirmation of title to the said Northern Pacific Railway Company as such purchaser, the said Northern Pacific Railroad

Company, by its proper officers and under its corporate seal, should sign, seal, execute, acknowledge and deliver to the said Northern Pacific Railway Company, as such purchaser, its deed or deeds of conveyance, assignment, transfer, release and further assurance of all said lands and rights to land, so sold as aforesaid to said Northern Pacific Railway Company, as such purchaser;

Now, Therefore, the said party of the first part in compliance with said decrees and for and in consideration of the sum of one dollar ($1.00), paid unto the said party of the first part, at or before the sealing and delivery of these
276 presents, the receipt whereof is hereby acknowledged; has conveyed, aliened, transferred, released and assigned, and by these presents does convey, alien, transfer, release, and assign unto the said party of the second part, its successors and assigns in title, all its right, title, interest and claim in, to and upon all lands situated within the state of Minnesota, and the state of North Dakota, east of the Missouri River, granted by the Congress of the United States to aid in the construction and equipment of the railroads of the said Northern Pacific Railroad Company for which patents have issued, and the right to receive lands under said grants of Congress for which patents have not issued, but which have been selected and certified to the said Northern Pacific Railroad Company, and also all lands granted by the Congress of the United States, situated in the state of Minnesota and the State of North Dakota east of the Missouri River, granted by the Congress of the United States to aid in the construction and equipment of the railroads of the said Northern Pacific Railroad Company for which patents have not issued, and which have not been selected by or certified to said railroad company, but to which said railroad company became entitled under said acts of Congress and all rights to receive from the United States lands in said state of Minnesota and said state of North Dakota, east of the Missouri River, which have not been certified or patented to the said Northern Pacific Railroad Company whether under the grant expressed in the act of Congress of July 2, 1864, or under any subsequent grant, by way of indemnity, or otherwise, and all right, title, interest and claim in or to any such lands, and all rights to receive pat-
277 ents therefor from the United States.

To Have And To Hold, the said granted and conveyed lands, premises, rights and privileges, with the appurtenances, unto the said party of the second part, its successors and assigns forever.

And the said party of the first part, for itself and its successors, does by these presents covenant and agree to and with the said party of the second part, its successors and assigns, that it will hereafter upon the demand or request of the party of the second part, its successors or assigns, make, execute and deliver to the party of the second part, its successors and assigns, such further conveyance, transfer, assignment or deed of any or all of the premises, rights, privileges and appurtenances hereby intended to be conveyed, as to the party of the second part or its counsel learned in the law, shall seem meet and proper, and that it will execute and deliver any further instruments, agreements, transfers or deeds that may be requisite or necessary to more fully and in detail comply with said decrees so entered in said circuit courts of the United States, viz: In the eastern district of Wisconsin on the 16th day of September, 1899, in the state of Minnesota on the 20th day of September, 1899, and in the state of North Dakota on the 21st day of September, 1899.

In Witness Whereof, the said party of the first part has caused these presents to be sealed with its corporate seal and signed by its president the day and year first above written.

NORTHERN PACIFIC RAILROAD COMPANY,
By W. J. Curtis,
Vice-President.

278 Signed, sealed and delivered in presence of,
John J. Tierney,
Edward J. Walsh.

Attest:
GEO. H. EARL,
Secretary.

[Seal]

Recorded at 10 A. M., October 20th, 1902, in St. Louis County, in 188 Deeds, page 568.

Endorsed: Defendant's Exhibit No. 8. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Cathrine Neff, Deputy Clerk.

279 Defendant's Exhibit No. 9.

(B) Deed No. 2751 E.

Minnesota Division.

Northern Pacific Railway Company.

This Deed, made the 19th day of January, in the year of our Lord One Thousand Nine Hundred, by the Northern Pacific Railway Company, a corporation duly incorporated under the laws of the State of Wisconsin, party of the first part, and Fred-

erick Weyerhaeuser and John A. Humbird, of the City of Saint Paul, in the County of Ramsey and State of Minnesota, parties of the second part, witnesseth:

That in consideration of the sum of One Hundred and Seventy-three Thousand, Forty-four and Seventy one hundredths (173,044.70) Dollars, unto it paid, the receipt of which is hereby acknowledged, does grant, bargain and convey unto the said parties of the second part, their heirs and assigns, the following described tracts of land, situate in the County of Saint Louis, in the State of Minnesota, that is to say:

The east half of the northeast quarter, the southwest quarter of the northeast quarter and the south half of section twenty-one (21) in township fifty-four (54) north of range twelve (12) west of the Fourth Principal Meridian.

* * * * * * * * * * * * *

280 Excepting and reserving therefrom a strip of land for railroad right of way one hundred (100) feet in width, that is fifty (50) feet on each side of the center line of the main track of the Duluth and Iron Range Railroad, as the same is now located and constructed across the following described lands, said right of way having been conveyed to said Duluth and Iron Range Railroad Company by deed dated December 30th, 1884, to-wit:

* * * * * * * * * * * * *

Together with the hereditaments and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold, the said lands and appurtenances unto the said parties of the second part, their heirs and assigns, forever free and clear of all liens, charges and encumbrances, except taxes and assessments, if any, levied or assessed since the first date of January, A. D. 1900.

The said party of the first part, for itself and its successors, covenants and agrees to and with the said parties of the second part, their heirs and assigns, that it is lawfully seized of all and singular the above granted and described premises, and has good right and lawful authority to grant, bargain, sell and convey the same in the manner aforesaid; and that the said parties of the second part, peaceably and quietly, have, hold, possess and enjoy the above described granted premises, and that the same are free from encumbrances, except
281 taxes and assessments, if any, levied or assessed since the first day of January, A. D. 1900.

In Witness Whereof, the said party of the first part has caused these presents to be sealed with its corporate seal and signed by its president, the day and year first above written.

NORTHERN PACIFIC RAILWAY COMPANY,
By .....
President.

Attest:

.....
Assistant Secretary.

Sealed and delivered in presence of

.....

.....

State of Minnesota,
County of Ramsey—ss.

On this ..... day of ....., 1900, before me personally appeared C. S. Mellen, to me personally known, who, being by me duly sworn, did say that he is the President of the Northern Pacific Railway Company, the corporation which executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf
282 of said corporation by authority of its Board of Directors, and said C. S. Mellen acknowledged said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office, in the City of St. Paul, the day and year last aforesaid.

.....
Notary Public, Ramsey County, Minn.

Endorsed: Defendant's Exhibit No. 9. Filed Dec. 1st, 1906. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

283 Defendant's Exhibit No. 13.

An Act Validating certain conveyances of the Northern Pacific Railroad Company and the Northern Pacific Railway Company.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway

Company, of land forming a part of the right of way of the Northern Pacific Railroad, granted by the Government by an Act of Congress, are hereby legalized, validated, and confirmed: Provided, That no such conveyance shall have effect to [diminish] said right of way to a less width than one hundred feet on each side of the center line of the main track of the railroad as now established and maintained.

Sec. 2. That this Act shall have no validating force until the Northern Pacific Railway Company shall file with the Secretary of the Interior an instrument in writing, accepting its terms and provisions.

Approved: April 28, 1904.

(Ch. 1782—58th Cong. Sess. II. 33 Stats. P. 538.)

Endorsed: Defendant's Exhibit No. 13. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy
284 Clerk.

Defendant's Exhibit No. 14.

Introduced in evidence at page 151 of this Record.

(Public—No. 172.)

An Act for the relief of certain Entrymen and settlers within the limits of the Northern Pacific Railway Land Grant.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the provisions of the Act of July first, eighteen hundred and ninety-eight (Thirtieth Statutes, pages five hundred and ninety-seven and six hundred and twenty), which provided for the adjustment by the Land Department of conflicting claims to lands within the limits of the grant to the Northern Pacific Railroad Company, and also the provisions of the Act of March second, nineteen hundred and one, entitled "An Act for the relief of settlers under the public land laws to lands within the indemnity limits of the grant to the Northern Pacific Railroad Company," be, and they hereby are, extended to include any bona fide settlement or entry made subsequent to January first, eighteen hundred and ninety-eight, and prior to May thirty-first, nineteen hundred and five, in accordance with the erroneous decision of the Land Department respecting the withdrawal on general route of the Northern Pacific Railroad between Wallula, Washington, and Portland, Oregon, where the same has not since been abandoned: Provided, That all lieu selections made under this Act shall be confined to lands within the State where the private holdings are situated.

285 Sec. 2. That this Act shall become effective upon an acceptance thereof by the Northern Pacific Railway Company being filed with the Secretary of the Interior.

Approved May 17, 1906.

Endorsed: Defendant's Exhibit No. 14. Filed Dec. 1st, 1906. Henry D. Lang, Clerk, by E. Catherine Neff, Deputy Clerk.

That on the 12th day of March, A. D. 1907, the Final Decree in said cause was filed with said Clerk and was, by him, duly recorded; which said Decree is, in words and figures, as follows, to-wit:

286 Charles D. Campbell,
No. 507. vs. In Equity.
John A. Humbird and Frederick Weyerhaeuser.

This cause came on to be heard on the 5th day of March, A. D. 1907, at Duluth, in said district, on the bill of complaint, the answers of the defendants, the replies thereto of the complainant, and the evidence taken thereon. Herbert H. Hoyt, Esquire, appeared on behalf of the complainant, and C. W. Bunn, Esquire, appeared on behalf of the defendants. The Court having duly considered the pleadings and evidence and the arguments of counsel; now, upon consideration thereof,

It is ordered, adjudged and decreed, that the bill of the complainant be, and the same is hereby, dismissed, with costs to be taxed.

PAGE MORRIS, Judge.

Dated at Duluth, Minnesota, March 11th, A. D. 1907.

Endorsed: Final Decree. Filed March 12, 1907. Henry D. Lang, Clerk, by Thos. H. Pressnell, Deputy Clerk.

287 That on the same day, to-wit: on the 12th day of March, A. D. 1907, there was entered in the term minutes of said Court an Order of Court staying all further proceedings in said cause, except the taxation of costs and entry of judgment therefor, for the period of forty-two days, to enable the complainant to prepare and present a bill of exceptions and make a motion for a new trial of said cause.

That on the 28th day of March, A. D. 1907, there was filed with said Clerk, a Petition on Appeal and Allowance thereof by the Court, Assignment of Errors and Bond on Appeal in said cause, in the words and figures following, to-wit:

288 Circuit Court of the United States for the District of Minnesota, Fifth Division.

Charles D. Campbell, Complainant and Appellant,
vs.
John A. Humbird and Frederick Weyerhaeuser,
Defendants and Apellees.

The above named complainant, Charles D. Campbell, conceiving himself aggrieved by the decree entered herein on the 11th day of March, 1907, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Eighth Circuit, and prays that this, his appeal, may be allowed; and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit. Dated March 27, 1907.

H. H. HOYT,
Solicitor for Appellant.

The foregoing appeal is allowed March 28, 1907.

PAGE MORRIS, Judge.

289 Circuit Court of the United States, for the
District of Minnesota, Fifth Division.

Charles D. Campbell, Complainant and Appellant,
vs.
John A. Humbird and Frederick Weyerhaeuser,
Defendants and Appellees.

And now in the above entitled cause, and at the time of filing his petition for appeal herein, comes the said appellant by H. H. Hoyt, his solicitor, and says that in the record and proceedings in the above entitled matter, it manifestly appears that the court erred in the following particulars, to-wit:

1st. In adjudging that the Northern Pacific Railroad Company, under its charter, approved July 2, 1864, was entitled to indemnity for the loss of land, which was the basis of the selection of the land in controversy in this case.

2nd. In adjudging that the land described in the bill of complaint herein was not vacant public land, subject to entry at the time Charles D. Campbell tendered his application to purchase the same.

3rd. In adjudging that the land described in the bill of complaint herein, which was situated on the North side of the line of the Northern Pacific Railroad Company, could be legally selected as indemnity for the base land which was situated on the South side of said railroad line.

4th. In not adjudging that the land described in the bill of

complaint herein, was vacant public land subject to entry at the time Charles D. Campbell made his application to purchase the same, said land having been restored to the
290 public domain by order of the Secretary of the Interior July 27, 1897 (25 L. D. 48) prior to the date of the application of Campbell.

5th. In adjudging that the claim of Charles D. Campbell to the land described in the bill of complaint herein, did not come within the provisions of the act of July 1, 1898, that it was not the intention of Congress in the enactment of said law to protect claims to land of such character.

6th. The Court erred in its construction of the act of July 1st, 1898, in adjudging that its provisions only applied to settlers upon the lands prior to January 1, 1898, and to those that had purchased the same and completed their entry prior to January 1, 1898.

7th. In adjudging that Charles D. Campbell had no claim to the land described in the bill of complaint herein that could be recognized, because the land was segregated from the public domain by the prior selection of the same by the Northern Pacific Railroad Company.

8th. In adjudging that under the act of Congress of June 3, 1878, entitled, "An act for the sale of timber lands in the States of California, Oregon, Nevada and Washington Territory", as amended by act of August 4, 1892, extending the benefits of the former act to all of the public land states, no right attached to the land by virtue of the application to purchase tendered by Charles D. Campbell, that his claim to the land by reason of his application, did not come within the purview of the act of July 1, 1898.

9th. In adjudging that there was a valid selection of this land by the Northern Pacific Railroad Company, and that such selection could be legally approved by the Secretary of
291 of the Interior.

10th. In adjudging that the Northern Pacific Railway Company was the successor in interest of the Northern Pacific Railroad Company.

11th. In adjudging that the patent issued to the Northern Pacific Railway Company for this land was valid.

12th. In not adjudging that under the evidence in this case the patent issued to the Northern Pacific Railway Company for the land in controversy, was issued without authority of the law and was void.

13th. In adjudging that the act incorporating the Superior & St. Croix Railroad Company, and the amendments thereto, (its name being changed to the Northern Pacific Railway Company); authorized said corporation to purchase this land and receive the title to the same from the United States.

14th. In adudging that the title to the land described in the bill of complaint herein was acquired by the Northern Pacific Railway Company by virtue of the sale made by the special master, as set forth in the answer of the defendants, and as shown by the evidence in this case.

15th. The Court erred in dismissing the bill of complaint and that the decree is erroneous in so ordering and adjudging.

Wherefore the complainant and appellant, Charles D. Campbell prays that said decree of the said Circuit Court of the United States for the District of Minnesota, Fifth Division, be reversed with directions to render and enter a decree in favor of complainant and appellant and against the defendants and appellees in accordance with the prayer of this appeal, and the prayer of the bill of complaint in this case.

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H. H. HOYT.
Solicitor for Complainant and Appellant,
Charles D. Campbell.

Circuit Court of the United States, for the District of Minnesota, Fifth Division.

Charles D. Campbell, Complainant and Appellant,
vs.
John A. Humbird and Frederick Weyerhaeuser, Defendants and Appellees.

Know all men by these presents, that we Nicholas H. Witt and George W. Power, are held and firmly bound unto the defendants above named in the sum of five hundred dollars to be paid to the said defendants for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 27th day of March, A. D. 1907.

Whereas, the above named complainant has prosecuted an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, to reverse the decree rendered in the above entitled suit by the Circuit Court of the United States for the District of Minnesota, Fifth Division.

Now, therefore, the condition of this obligation is such that if the above named appellant shall prosecute said appeal to effect and answer all damages and costs if he fails to make said appeal good, then this obligation shall be void,
293 otherwise the same shall be and remain in full force and virtue.

[Seal] NICHOLAS H. WITT.
[Seal] GEO. W. POWER.

Signed, sealed and delivered in presence of:
L. O. Baxter,
O. T. Wick.

United States of America,

District of Minnesota,
County of St. Louis—ss.

Be it known, That on this 27th day of March, A. D. 1907, before me personally appeared Nicholas H. Witt and George W. Power, to me known to be the persons described in and who executed the foregoing bond, and acknowledged the same to be their free act and deed.

[Notarial Seal] LAURA O. BAXTER,
Notary Public, St. Louis County, Minnesota.
My commission expires Feb. 12th, 1914.

United States of America,

District of Minnesota,
County of St. Louis—ss.

Nicholas H. Witt and George W. Power, the sureties named in and who executed the foregoing bond, being first duly sworn, doth each for himself, depose and say that he is a resident and freeholder of the State of Minnesota, and worth the amount of one thousand dollars over and above his debts and liabilities and exclusive of his property exempt from execution.

294 NICHOLAS W. WITT,
GEO. W. POWER.

Subscribed and sworn to before me this 27th day of March A. D. 1907.

[Notarial Seal] LAURA O. BAXTER,
Notary Public, St. Louis County, Minnesota.
My commission expires Feb. 12th, 1914.

The foregoing bond is approved as to form and sufficiency this 28th day of March, A. D. 1907.

PAGE MORRIS, Judge.

Endorsed: Petition on appeal and allowance thereof, as-

signment of errors and bond on appeal. Filed March 28, 1907. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk.

That on the 1st day of April A. D. 1907, there was filed with said clerk the citation on appeal in said cause, with proof of service thereof; which citation is hereto attached.

295 United States of America. Circuit Court. Eighth Circuit.

Citation.

United States of America: To Frederick Weyerhaeuser and John A. Humbird—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date this citation bears date, pursuant to an appeal filed in the Clerk's Office of the United States Circuit Court, District of Minnesota, Fifth Division, wherein Charles D. Campbell is appellant and you are appellee to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Seal
U. S. Circuit Court
Fifth Division
District of Minnesota.

Witness, the Honorable Page Morris, a Judge of the District Court of the United States, District of Minnesota, sitting as Judge of the Circuit Court in and for said District this 28th day of March A. D. 1907.

PAGE MORRIS, Judge.

Due service of the foregoing citation by copy at St. Paul, Minnesota, is hereby admitted this 30th day of March, 1907.

C. W. BUNN,
Attorney for Appellees.

Entered No. 507. No. 507. United States Circuit Court, District of Minnesota, 5th Division. Charles D. Campbell vs. Frederick Weyerhaeuser and John A. Humbird, Defendant. Citation. Filed this 1st day of April, 1907. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy.

296 United States Circuit Court, District of Minnesota,

Fifth Division.

I, Henry D. Lang, Clerk of said Court, do hereby certify and return to the Honorable the United States Circuit Court of

Appeals for the Eighth Circuit, that the foregoing consisting of 289 pages numbered from 1 to 289 inclusive, is a true and complete transcript of the records, process, pleadings, evidence, final decree, and all other proceedings in the cause entitled Charles D. Campbell vs. Frederick Weyerhaeuser and John A. Humbird, defendants, and the whole thereof—(with the exception of certain exhibits and documents expressly stipulated by all the parties to said cause and order of the court, to be omitted from said record, which stipulation and order appears at pages 2, 3 and 4 of this record)—as appears from the original records and files of said Court; and I further certify and return that I have annexed to said transcript and included within said paging the original citation, with admission by attorneys for defendants, of service thereof.

In witness whereof I have hereunto set my official signature as Clerk aforesaid, and the seal of said Circuit Court, Fifth Division, at Duluth, said District and Division this 12th day of June, A. D. 1907.

Seal
U. S. Circuit Court
Fifth Division
District of Minnesota.

HENRY D. LANG, Clerk.
By Thos. H. Pressnell, Deputy.

Filed June 19, 1907. John D. Jordan, Clerk.

(*Appearance of Counsel for Appellant.*)

On the nineteenth day of June, A. D. 1907, the appearance of counsel for appellant was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2638.

CHARLES D. CAMPBELL, Appellant,
vs.
FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD.

The Clerk will enter my appearance as counsel for the Appellant.

H. H. HOYT,
Duluth, Minn.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2638. Charles D. Campbell, Appellant, *vs.* Frederick Weyerhaeuser, *et al.* Appearance. Filed Jun- 19, 1907, John D. Jordan, Clerk. H. H. Hoyt, Counsel for Appellant, Duluth, Minn.

(*Appearance of Counsel for Appellees.*)

And on the fourth day of October, A. D. 1907, the appearance of counsel for appellees was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2638.

CHARLES D. CAMPBELL, Appellant,
vs.
FREDERICK WEYERHAEUSER ET AL.

The Clerk will enter my appearance as Counsel for the Appellees.

CHARLES W. BUNN,
St. Paul, Minn.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2638. Charles D. Campbell, Appellant, *vs.* Frederick Weyerhaeuser, *et al.* Appearance. Filed Oct. 4, 1907, John D. Jordan, Clerk. Charles W. Bunn, Counsel for Appellees.

(*Order of Submission.*)

And on the seventeenth day of January, A. D. 1908 in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1907.

FRIDAY, *January* 17, 1908.

No. 2638.

CHARLES D. CAMPBELL, Appellant,
vs.
FREDERICK WEYERHAEUSER ET AL.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This cause having been called for hearing in its regular order, the same was argued by Mr. Herbert H. Hoyt for the appellant and by Mr. Charles W. Bunn for the Appellees.

Thereupon this cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the seventeenth day of April, A. D. 1908, an opinion of said United States Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2638, December Term, A. D. 1907.

CHARLES D. CAMPBELL, Appellant,
vs.
FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Appellees.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Mr. Herbert H. Hoyt for appellant.
Mr. Charles W. Bunn for appellees.

Before Sanborn and Adams, Circuit Judges, and Phillips, District Judge.

Syllabus.

1. PUBLIC LANDS—PATENT—ONE NOT IN PRIVITY WITH THE UNITED STATES CANNOT MAINTAIN SUIT TO CHARGE TITLE UNDER WITH TRUST.—One who has never by acceptance of a grant, or by settlement and improvement, or by entry, or by payment, placed himself in privity with the United States in title before a patent issues to another may not maintain a bill in equity to charge the title under it, with a trust in his favor. One, whose application to purchase is rejected when presented, may not maintain such a suit.
2. NORTHERN PACIFIC LAND GRANT—ONE, WHOSE APPLICATION TO PURCHASE WAS DENIED WHEN PRESENTED, NOT A BENEFICIARY OF ACT OF JULY 1, 1898, 30 STATS. 620.—The beneficiaries of the Act of July 1, 1898, 30 Stats. 620, Chap. 546, are purchasers directly from the United States of, occupants of, and qualified settlers upon, the lands there described prior to January 1, 1898, under some law of the United States or some ruling of the Interior Department. One who had not purchased of the United States, or occupied, or settled upon, or acquired any equitable right to, or interest in, any of the land there described prior to January 1, 1898, but whose application to purchase had been rejected by the Land Department when presented, does not fall within the provisions of the act and cannot invoke its aid.

SANBORN, Circuit Judge, delivered the opinion of the court:

The nature of this case and the questions presented in it are the same as those in *Hoyt v. Weyerhaeuser et al.*, in which the opinion is filed herewith. The facts of this case differ from the facts in that case in this. In Hoyt's case his remote grantor, Jones, entered, purchased and paid for his land in 1897 and 1898 under the Timber and Stone Act, 20 Stats. 89; 27 Stats. 348; 2 U. S. Comp. Stats.

1545, before its selection by the Railway Company had been approved by the Secretary of the Interior. In this case the complainant, Campbell, repeatedly filed with the Land Department his application to enter the land which he claims under those acts prior to January 1, 1898, and before the Railway Company's selection of that land was approved by the Secretary of the Interior, but the officers of the Land Department rejected his application each time and refused to permit him to enter the land. In Hoyt's case Jones became the vendee of the United States, paid for and became the equitable owner of his land. In this case Campbell was refused permission to purchase the land he seeks, he never entered or paid for it, his right to buy it was never recognized by the United States and he was never in privity with it. The difference is radical and fatal to this suit in equity.

One who has never by acceptance of a grant, or by settlement and improvement, or by occupation, or by entry, or by payment, placed himself in privity with the United States in title before a patent issues to another may not maintain a bill in equity to charge the title under the patent with a trust in his favor. *Smelting Co. v. Kemp*, 104 U. S. 636, 647; *De Wrese v. Reinhard*, 10 C. C. A. 55, 59, 60, 61 Fed. 777, 781, 782; *Hartman v. Warren*, 22 C. C. A. 30, 36, 76 Fed. 157, 163; *New Dunderberg Mining Co. v. Old*, 79 Fed. 598, 606, 25 C. C. A. 116, 124; *Spencer v. Lapsley*, 20 How. 264, 269; *Beard v. Federy*, 3 Wall. 478, 493; *McIntyre v. Roschlaub*, 37 Fed. 556, 557. The indispensable basis of a suit in equity to charge the legal title to land under a patent is an equitable interest in the land in the complainant which is superior to the legal title of the defendant. The right under the general land laws of every qualified citizen to enter any tract of land open to entry thereunder is not, and no one can convert it into, such an interest in land by making an application to purchase which the officers of the Land Department unlawfully deny. The right to an allowance of such an application is a privilege merely and not an equitable interest or title. The applicant acquires no equitable interest in the land by his application and its denial and in the absence of such an interest no suit in equity can be maintained. Irreparable injury is conclusively presumed from the refusal of one to perform his contract to convey real property and it is upon that ground that suits in equity to charge titles under patents with trusts for vendees and grantees are maintained, but there is no presumption of irreparable injury from the unlawful refusal of the government to sell land in which the applicant has secured no equitable interest, and hence such a refusal will not sustain a bill in equity. The applicant pays nothing for the tract he is refused permission to buy, his loss by the refusal is measurable in damages, he may purchase another tract, and if courts of equity should entertain suits upon such applications and denials they would become courts for the production, rather than for the prevention, of a multiplicity of suits. In *Smelting Co. v. Kemp*, 104 U. S. 636, 647, the Supreme Court said that one who would maintain a suit in equity to charge a title under a patent with a trust in his favor must "connect himself with the original source of title so as to be able to

aver that his rights are injuriously affected by the existence of the patent and he must possess such equities as will control the legal title in the patentee's hands." The complainant in this suit made no such connection and he had no equities of that character.

Counsel, however, urges another reason why his bill should be sustained. He claims that Campbell is entitled to the land under the provisions of the Sundry Civil Act of July 1, 1898, 30 Stats. 597, 620, Chap. 546, but the beneficiaries of that Act are purchasers directly from the United States of, occupants of, and qualified settlers upon, the lands there described prior to January 1, 1898, under some law of the United States or some ruling of the Interior Department. The complainant was not a member of either of these classes. He had not purchased, or occupied, or settled upon, or acquired any equitable right to or interest in the land in controversy prior to July 1, 1898, and he cannot successfully invoke the aid of the Act of July 1, of that year. There is no equity in the suit of the complainant and the decree which dismissed his bill is *Affirmed*.

Filed April 17, 1908.

(*Decree.*)

And on the seventeenth day of April, A. D. 1908, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1907.

FRIDAY, *April* 17, 1908.

No. 2638.

CHARLES D. CAMPBELL, Appellant,
vs.
FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that Frederick Weyerhaeuser and John A. Humbird have and recover against Charles D. Campbell the sum of twenty dollars for their costs herein and have execution therefor.

APRIL 17, 1908.

(Petition for Appeal and Order of Allowance.)

And on the thirtieth day of May, A. D. 1908, a petition for appeal and order of allowance was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Eighth Circuit.

CHARLES D. CAMPBELL, Complainant and Appellant,
vs.
FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Defendants Appellees.

Now comes the said Charles D. Campbell appellant in the above entitled cause, and conceiving himself aggrieved by the decree affirming the decree of the Circuit Court made and entered in the above entitled cause on the 17th day of April, 1908, by the United States Circuit Court of Appeals for the Eighth Circuit, doth hereby appeal from said decree of the United States Circuit Court of Appeals for the Eighth Circuit, to the Supreme Court of the United States, and this appellant prays that said appeal may be allowed and that a transcript of the record and proceedings herein, upon which said decree was made and entered, duly authenticated, may be presented to the Supreme Court of the United States.

H. H. HOYT,
Solicitor for Complainant and Appellant.

And now, to-wit, this 15 day of May, 1908, it is ordered that the appeal prayed for by the above petition filed with the assignment of errors herein be and is hereby allowed.

WALTER H. SANBORN,
Circuit Judge.

(Endorsed:) No. 2638. Charles D. Campbell, Appellant, *vs.* Frederick Weyerhaeuser, *et al.* Petition for Appeal and Order of Allowance. Filed May 30, 1908, John D. Jordan, Clerk.

(Assignment of Errors on Appeal to the Supreme Court of the United States.)

And on the thirtieth day of May, A. D. 1908, an assignment of errors on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

CHARLES D. CAMPBELL, Complainant and Appellant,
vs.
FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Defendants and Appellees.

Assignment of Errors.

Now comes the above complainant and appellant, Charles D. Campbell and makes and files the following assignment of errors upon which he will rely upon his appeal from the decree of the Court above made and entered herein, on the 17th day of April, 1908, as follows:

1st. The court erred in holding that it was necessary in order to maintain the appellant's action, for the appellant to place himself in privity with the United States. And in not holding that the action was for the purpose of canceling from the record a patent that had been inadvertently issued for the land against the appellant's legal right of preference in purchase, the disregard of the law in refusing to the appellant the benefit of this legal right of preference in purchase constituted the foundation of the appellant's cause of action, and from such neglect of appellant's rights the patent issued by the United States for the land in controversy to the Northern Pacific Railway Company was void and should be vacated and set aside.

2nd. The Court erred in holding that the appellant Campbell by his applicant to purchase the land described in his application which at the date of his said application was vacant, unappropriated public land belonging to the public domain did not by such application obtain a legal right of preference to purchase said land under the act of June 3, 1878, as amended by act of August 4, 1892, over any subsequent applicant, under the law as it stood when the land officers rejected his application, said law has never since been altered, amended or repealed.

And in not holding that it was the action of those officers and their disregard of the law in refusing to the appellant the benefit of this legal right of preference in purchase; the appellant by his bill filed in this cause desired the court to correct, by removing from the record the patent issued to the Northern Pacific Railway Company for this land, so that the appellant might proceed with his proofs under the law, and by payment obtain the usual evidence of title to the land.

3rd. The Court erred in holding that as the appellant's application to purchase was rejected by the land officials, his claim to the land does not fall within the provisions of the act of Congress of July 1, 1898.

4th. The Court erred in holding that the appellant Campbell by his application for the land described in his complaint in this cause, the same having been rejected by the land officials, did not acquire any equitable rights or interest in said land under the provisions of the Act of Congress of July 1, 1898.

5th. The Court erred in holding that it was necessary for the complainant and appellant in order to acquire a right to the land described in the bill of complaint filed in this cause to have some privity with the government, and to have a legal or equitable title to this land, or a vested right therein, in order that from such superior equity the decree of the court would invest the appellees in the capacity of trustees holding this land for the benefit of the appellant.

6th. The Court erred in not finding as a fact that the land described in the bill of complaint filed herein was not vacant public land subject to entry at the several dates when the appellant Charles D. Campbell made his application to purchase, and that the sole reason for the rejection of his said application to purchase said land was based on the judgment of the land department that such application of said Charles D. Campbell was in conflict with a valid prior selection of said land by the Northern Pacific Railroad Company, which claim of selection had no foundation in fact.

7th. The Court erred in not considering the fact that if there was a prior selection of the land in controversy by the Northern Pacific Railroad Company such selection was illegal and void for the reason that the base land was on the south side of the line of road, and the indemnity land was on the other side of the line of the railroad.

8th. The court erred in adjudging that the claim of Charles D. Campbell the appellant, to the land described in the bill of complaint herein, did not come within the provisions of the act of Congress of July 1, 1898, and that it was not the intention of Congress in the enactment of said law to protect claims resting upon the application of claimants of the character of that of Charles D. Campbell.

9th. The Court erred in its construction of the provisions of the Act of Congress of July 1st, 1898.

10th. The court erred in not adjudging that under the evidence in this case the patent issued by the United States to the Northern Pacific Railway Company for the land in controversy was issued without authority of law and was illegal and void.

11th. The court erred in affirming the decree of the Circuit Court made and entered in this case March 28th, 1907.

12th. The court erred in not making and entering a decree in favor of the complainant and appellant Charles D. Campbell and against the defendants and *appellants* Frederick Weyerhaeuser and John A. Humbird.

Wherefore, the complainant and appellant Charles D. Campbell prays that said decree of the Circuit Court of Appeals of the United States for the Eighth Circuit be reversed, with directions to render and enter a decree in favor of the complainant and appellant and against the defendants and appellees in accordance with the prayer for this appeal, and the prayer of the bill of complaint in this case.

H. H. HOYT,

Solicitor for Complainant and Appellant Charles D. Campbell.

(Endorsed:) No. 2638. Charles D. Campbell, Appellant, *vs.* Frederick Weyerhaeuser, *et al.*, Assignment of Errors. Filed May 30, 1908, John D. Jordan, Clerk.

(*Bond on Appeal to the Supreme Court of the United States.*)

And on the thirtieth day of May, A. D. 1908, a bond on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

CHARLES D. CAMPBELL, Complainant and Appellant,
vs.
FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Defendants and Appellees.

Know all men by these presents: That we, Charles D. Campbell as principal and George W. Power and Nicholas H. Witt of the City of Duluth and State of Minnesota, as sureties, are held and firmly bound unto Frederick Weyerhaeuser and John A. Humbird in the full sum of Five Hundred Dollars to be paid to said Frederick Weyerhaeuser and John Humbird, their attorneys, executors, administrators or assigns, which payment well and — to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of May, A. D. 1908.

Whereas lately at a session of the Circuit Court of Appeals of the United States for the eighth circuit in a suit pending in said court between said Charles D. Campbell, complainant and appellant, and Frederick Weyerhaeuser and John A. Humbird, defendants and appellees, a decree was rendered against the said Charles D. Campbell, and the said Charles D. Campbell having obtained from said court an order allowing the appeal to the Supreme Court of the United States to reverse the decree so rendered in the aforesaid suit and a citation directed to the said Frederick Weyerhaeuser and John A. Humbird is about to be issued citing and admonishing them to be and appear at the United States Supreme Court at the city of Washington, District of Columbia.

Now, therefore, the condition of the above obligation is such that if the said Charles D. Campbell shall prosecute his said appeal to effect and shall answer all damages and costs that may be awarded against him, if he fails to make his plea good, then this obligation is to be void; otherwise to remain in full force and virtue.

CHARLES D. CAMPBELL. [L. S.]
GEO. W. POWER. [L. S.]
NICHOLAS H. WITT. [L. S.]

STATE OF MINNESOTA, *County of St. Louis, ss:*

George W. Power and Nicholas H. Witt being first duly sworn on oath each for himself deposes and says that he is a resident and freeholder of the county and state above named, and that he is worth the sum mentioned in the above bond and obligation over and above all just debts and liabilities and exclusive of property exempt from execution and property situated in the district of Minnesota.

GEORGE W. POWER.
NICHOLAS H. WITT.

Subscribed and sworn to before me this 14 day of May, 1908.

[SEAL.] MARIE OLSEN,
Notary Public, St. Louis County, Minn.

My Commission Expires Oct. 25, 1912.

The foregoing bond and sureties therein are hereby approved this 15th day of May, 1908.

WALTER H. SANBORN,
Circuit Judge.

(Endorsed:) No. 2638. Charles D. Campbell, Appellant, *vs.* Frederick Weyerhaeuser, *et al.* Appeal Bond. Filed May 30, 1908. John D. Jordan, Clerk.

(*Citation.*)

And on the thirtieth day of May, A. D. 1908, a citation on appeal to the Supreme Court of the United States was filed in said cause, the original of which, with the Marshal's return of service, is hereto attached and herewith returned:

The United States of America, to Frederick Weyerhaeuser and John Humbird, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, D. C., thirty days from and after the day this Citation bears date, pursuant to an appeal, filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein Charles D. Campbell is appellant, and you are Appellees, to show cause, if any there be, why the decree rendered against the said Appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Paul, Minnesota, this 15th day of May in the year of our Lord one thousand nine hundred and eight.

WALTER H. SANBORN,
Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

The United States of America to Frederick Weyerhaeuser and John Humbird, Greeting:

I hereby certify and return that I served the annexed Citation on Charles W. Bunn, the solicitor for the defendants and appellees, Frederick Weyerhaeuser and John Humbird by handing to and leaving with him a true and correct copy thereof with the said Charles W. Bunn personally at St. Paul in said District on the 18th day of May, A. D. 1908.

WILLIAM H. GRIMSHAW,
U. S. Marshal,
By CHARLES KILLEBROW.

[Endorsed:] 1957 Supreme Court of the United States No. — October Term, 1908. Charles D. Campbell, Appellant, *vs.* Frederick Weyerhaeuser, *et al.* Citation. Filed May 30 1908 John D. Jordan, clerk.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals, in a certain cause in said Court wherein Charles D. Campbell is Appellant and Frederick Weyerhaeuser and John A. Humbird are Appellees, No. 2638, as full, true and complete as the originals of same remain on file and of record in my office.

I do further certify that the original citation in said cause, with the Marshal's return of service, is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this second day of June, A. D. 1908.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 21,226. U. S. Circuit Court Appeals, eighth circuit. Term No. 430. Charles D. Campbell, appellant, *vs.* Frederick Weyerhaeuser and John Humbird. Filed June 12th, 1908. File No. 21,226.

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1907, of said Court, begun and held at the United States Court House in the City of St. Louis, Missouri, on the first Monday in December, to-wit: the second day of December, A. D. 1907, before the Honorable Walter H. Sanborn and the Honorable Elmer B. Adams, Circuit Judges, and the Honorable John F. Philips, District Judge.

Attest:

[Seal United States Circuit Court of Appeals,
Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the nineteenth day of June, A. D. 1907, a transcript of record, pursuant to an appeal allowed by the Circuit Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Charles D. Campbell was appellant and Frederick Weyerhaeuser and John A. Humbird were Appellees, which said transcript of record is in the words and figures following, to-wit:

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1910.

No. [redacted] 181.

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

FRED WASS AND PAULINE WASS, HIS WIFE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED MARCH 29, 1909.

(21,570.)

(21,570.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 397.

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

FRED WASS AND PAULINE WASS, HIS WIFE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 27, 1909.

1 UNITED STATES OF AMERICA,
State of Minnesota:

To the Honorable Charles M. Start, Chief Justice of the Supreme Court of the State of Minnesota:

The petition of the Northern Pacific Railway Company respectfully shows that on the 7th day of October, 1908, the Supreme Court of the State of Minnesota rendered a final decree against your petitioner in a certain cause, wherein your petitioner, the Northern Pacific Railway Company, was plaintiff and Fred Wass and Pauline Wass were defendants, affirming the judgment of the District Court for Todd County, Minnesota, as will appear by reference to the record and proceedings in said cause; and that said Supreme Court of Minnesota is the highest court of said state in which a decision in said suit can be had.

Your petitioner claims the right to remove said decree to the Supreme Court of the United States by writ of error under Section 709 of the Revised Statutes of the United States for the reason that there was drawn in question in said cause the validity of a statute or an authority exercised under the United States and the decision was against its validity, and that a manifest error hath intervened to the great damage of said Northern Pacific Railway Company, as appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore, your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States.

NORTHERN PACIFIC RAILWAY COMPANY, *Petitioner.*
CHARLES W. BUNN,
Attorney for Petitioner.

Let the Writ of Error issue as prayed.

CHARLES M. START,
Chief Justice of the Supreme Court of Minnesota.

Dated February 26th, 1909.

2 STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Petition for writ of error in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 15th day of March, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

3 THE UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court of the State of Minnesota before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in a suit between the Northern Pacific Railway Company, plaintiff and Fred Wass and Pauline Wass, his wife, defendants, said suit being there entitled "Northern Pacific Railway Company, plaintiff and appellant, vs. Fred Wass and Pauline Wass, his wife, defendants and respondents," wherein was drawn in question the validity of a statute — or an authority exercised under the United States, and the decision was against its validity, a manifest error hath intervened to the great damage of said Northern Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

4 Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 26th day of February in the year of our Lord one thousand nine hundred and nine.

[U. S. Circuit Court Seal, District of Minnesota, Third Division.]

HENRY D. LANG,
Clerk of Circuit Court of United States for District of Minnesota.
By LOUISE B. TROTT,
Deputy.

The above writ is hereby allowed.
CHAS. M. START,
Chief Justice of Supreme Court of Minnesota.

5 [Endorsed:] Filed Mar. 1, 1909. C. A. Pidgeon, Clerk.

6 THE UNITED STATES OF AMERICA, ss:

To Fred Wass and Pauline Wass, his wife, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Minne-

sota, wherein the Northern Pacific Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Charles M. Start, Chief Justice of the Supreme Court of the State of Minnesota, this 26th day of February, in the year of our Lord one thousand nine hundred and nine.

CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

Service of the above citation is admitted this 27 day of February, 1909.

P. B. GORMAN,
Attorney for Defendants.

7 STATE OF MINNESOTA:

Supreme Court.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
FRED WASS and PAULINE WASS, His Wife, Defendants in Error.

Know all men by these presents, that we, the Northern Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, as principal, and the National Surety Company, a corporation organized and existing under the laws of the State of New York, as surety, are held and firmly bound unto Fred Wass and Pauline Wass, his wife, in the full and just sum of two-hundred and fifty dollars ($250.00), to be paid to said Fred Wass and Pauline Wass, their heirs, executors or assigns, for which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 25th day of February, in the year of our Lord one-thousand nine-hundred and nine.

Whereas lately in the Supreme Court of the State of Minnesota in a suit pending in said court between the Northern Pacific Railway Company, plaintiff, and Fred Wass and Pauline Wass, his wife, defendants, said suit being there entitled "Northern Pacific Railway Company, Plaintiff and Appellant, vs. Fred Wass and Pauline
8 Wass, his wife, Defendants and Respondents," judgment was rendered against the said plaintiff, Northern Pacific Railway Company, and the said plaintiff having obtained a writ of error and filed a copy thereof in the office of the Clerk of said Supreme Court of Minnesota, to reverse the judgment in the aforesaid suit, and a citation directed to the said Fred Wass and Pauline Wass, citing and admonishing them to be and appear at the Supreme Court of the United States at the city of Washington on or before the 27th day of March 1909;

Now, the condition of the above obligation is such that if the said

Northern Pacific Railway Company shall prosecute the said writ of error to effect and answer all damages and costs, if it shall fail to make its plea good, then this obligation to be void; otherwise to remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY,
By CHARLES W. BUNN, *Its Attorney.*

[National Surety Co. Seal.]

NATIONAL SURETY COMPANY,
By A. M. BEND, *Its Attorney in Fact.*

E. B. McANDY.
L. H. GREEN.

9 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 25th day of February, 1909, before me personally appeared C. M. Bend, Attorney in Fact of the National Surety Company, the above named corporation, with whom I am personally acquainted, who, being by me duly sworn, said: That he is Attorney in Fact of said corporation, the National Surety Company, that he knows the corporate seal, that it was affixed by order of the board of directors of said corporation, and that he signed said instrument as Attorney in Fact of said corporation by like authority and the said C. M. Bend acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] R. H. MARTIN,
Notary Public, Ramsey County, Minnesota.

My Commission expires July 12, 1914.

Approved by:

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

10 STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the bond on appeal and approval thereon in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 15th day of March, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

11 STATE OF MINNESOTA:

Supreme Court.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
FRED WASS and PAULINE WASS, His Wife, Defendants in Error

Assignments of Error.

Now comes the plaintiff in error, Northern Pacific Railway Company, and says that in the judgment of the Supreme Court of Minnesota herein there is manifest error as follows, to-wit: The court erred

1. In holding that the approval of the railway company's selection by the Secretary of the Interior was without authority and void, and that the Secretary had no discretion in the premises but was legally bound to approve the homestead application of the defendant in error.

2. In adjudging that the plaintiff in error holds its title under the patent of the United States as trustee for the defendant in error, and in decreeing that the plaintiff in error convey accordingly.

NORTHERN PACIFIC RAILWAY COMPANY.
By CHARLES W. BUNN, *Its Attorney.*

12 STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the assignments of error in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 15th day of March, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

13 STATE OF MINNESOTA:

Supreme Court, April Term, 1908.

State of Minnesota, District Court, County of Todd, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
FRED WASS and PAULINE WASS, His Wife, Defendants.

Complaint.

The plaintiff herein, for cause of action against the above named defendants, respectfully shows unto the court:

I.

That the plaintiff, Northern Pacific Railway Company, is a corporation organized and existing under the laws of the State of Wisconsin.

14 II.

That plaintiff is the owner of the southeast quarter of section thirteen (13) in township one hundred and twenty-nine (129) north of range thirty-two (32) west, situate in the County of Todd, and State of Minnesota, and is entitled to the possession of said premises.

III.

That the defendants wrongfully withheld the possession of said premises from this plaintiff, and although the plaintiff has demanded of the defendants that they deliver to plaintiff the possession of said premises, the defendants refuse so to do.

IV.

That the value of the rents, issues and profits of said premises is the sum of one hundred ($100.00) dollars per year.

Wherefore, Plaintiff prays judgment against said defendants (1) for the recovery of the said described premises; (2) for the sum of one hundred ($100.00) dollars per year from June 2, 1905 to the date when said premises shall be restored to the possession of the plaintiff; and (3) for its costs and disbursements in this action.

C. W. BUNN,
M. T. SANDERS,
Attorneys for Plaintiff.

(Verified.)

15 *Answer.*

(Title of Cause.)

For answer to the plaintiff's complaint in the above entitled cause the defendant, Fred Wass, denies each and every allegation, matter and thing in said complaint contained, except as is hereinafter qualified or admitted.

1. Further answering said complaint, this defendant, Fred Wass, further alleges and shows to this Court that the St. Paul and Northern Pacific Railway Company is a corporation created and existing under and by virtue of the laws of the State of Minnesota, and that this defendant, Fred Wass, is a citizen of the United States and of the State of Minnesota, residing in the County of Todd and State of Minnesota.

2. That at the dates hereinafter mentioned the southeast quarter of section thirteen (13) township one hundred twenty-nine (129) north of range thirty-two (32) west of the fifth (5) principal meridian St. Cloud, Minnesota Land District, were surveyed public lands of the United States, lying and being in the County of Todd and State of Minnesota, and being within the twenty miles indemnity

limits of the grants made to the Territory of Minnesota by
16 act of Congress approved March 3, 1857 (11 Stat. 195) for
the purpose of aiding in the construction of railroads from Stillwater, by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood River with a branch via St. Cloud and Crow Wing to the navigable waters of the Red River of the North, at such point as the legislature of said territory may determine, also within the indemnity limits of the grant made to the State of Minnesota for the same purpose by the act of Congress approved March 3, 1865 (13 Stat. 526) as amended by the act of Congress approved March 3, 1871 (16 Stat. 588.)

All the right, title and interest of the State of Minnesota in and to said grants and to the lands described or included therein were conferred by the act of the legislature of said State of Minnesota dated March 1, 1877, on the Western Railway Company of Minnesota and subsequently by said Western Railway Company assigned and transferred to the St. Paul and Northern Pacific Railway Company.

3. On the 31st day of December, 1877, said Western Railway Company, the then transferee and beneficiary of and under each of said grants, filed in the United States Land Office at St. Cloud, Minnesota, a list of lands including the tract above described,
17 which purported to be a list of selections under the indemnity
provisions of its grants, but neither said list nor any paper accompanying it designated any lands within the primary limits of either of said grants as having been lost to the company so as to become the basis for the selected tracts.

On Dec. 4, 1889, the St. Paul and Northern Pacific Railway Company, the successor in interest of the said Western Railway Company, filed in the St. Cloud Land Office an amended selection list of indemnity lands including among others the tracts particularly described in paragraph two (2) of this Bill of Complaint, and February 12, 1892, said company also filed in said Land Office a rearranged list of indemnity selections, also containing reference to said described lands and for the first time designated therein a basis for each tract so selected. None of said selection lists was approved by the Secretary of the Interior, as required by law, and each and all thereof were illegal and without valid force or effect.

4. Said described tracts of land are also within the indemnity limits of the grant to the Northern Pacific Railway Company under the provisions of the act of Congress approved July 2, 1864 (13 Stat. 365) and were included in a withdrawal of indemnity lands made by the Secretary of the Interior,
18 Dec. 26, 1871 for the benefit of said company, said with-
drawal was not authorized by law and was revoked by the acting Commissioner of the General Land Office with the approval of the acting Secretary of the Interior, Sept. 6, 1887 (6 L. D. 131). No selection of the described tracts of land or any of them was ever made under the provisions of the grant to the Northern Pacific Railway Company, and no right in said company or any transferee claiming under it has attached to said lands or any thereof.

5. That in the month of April, 1899, this defendant, being then, as now, a citizen of the United States and a resident of the State of

Minnesota, over twenty-one (21) years of age, the head of a family, not the proprietor of more than one hundred sixty (160) acres of land in any state or territory, and otherwise in all respects qualified to become a homestead claimant under the laws of the United States entered upon, took possession of and made a settlement on the lots of land above described, with the bona fide intention of entering the same under the said homestead laws, said lands being at that time vacant public lands of the United Statss subject to such entry and settlement, and ever since said date he, this defendant, has
19 maintained his said possession and use of said tracts as a homestead, and has resided thereon and used the same as his only home, and has cultivated said lands each year, and has otherwise improved the same. That the improvements made and placed upon said lands are of the reasonable value of twelve hundred ($1,200.00) dollars, and the tracts of land themselves in their improved state are of a value in excess of twenty-five hundred ($2,500.00) dollars.

6. On the 4th day of December, 1899, this defendant, being then, as now, a qualified homestead claimant, as aforesaid, presented to and filed with the Register and Receiver of the United States Land District of St. Cloud, in the State of Minnesota, within which land district said lands are situated, a proper and legal application to enter said lands under the homestead laws of the United States, the same being then and there subject to such entry and accompanied such application by all the required proofs of his qualifications and actions as a homestead claimant, and at the same time tendered to the Receiver of said land district the lawful fees and commissions properly chargeable upon the allowance of such application. But said Register and Receiver, having received and filed said applica tion, did on the same day reject the same and refuse to receive
20 the fees and commissions tendered by this applicant, basing such rejection and refusal upon the sole ground that the lands applied for were embraced in a then pending, though unapproved indemnity selection of the said St. Paul and Northern Pacific Railway Company.

From such rejection and refusal this defendant appealed to the Commissioner of the General Land Office.

On July 10, 1903, the Commissioner of the General Land Office affirmed the decision of the local land officers of the St. Cloud District, rejecting the application of this defendant, filed as above stated, on Dec. 4, 1899, for the reason as stated by him that such application conflicted with the prior indemnity selection of the land by the St. Paul and Northern Pacific Railway Company. From this decision of the Commissioner this defendant appealed to the Secretary of the Interior and on Jan. 9, 1904, the Secretary of the Interior affirmed said decision of the Commissioner on the ground that the indemnity selection of said lands by said St. Paul and Northern Pacific Railway Company and its predecessor, the Western Railway Company of Minnesota, were valid and of record prior to the date of the alleged settlement and filing of homestead application
21 by this defendant. No other grounds for the rejection of the homestead application of this defendant was given. Neither

his qualifications as a homestead claimant nor the sufficiency of his residence on the land, nor the value of the improvements placed thereon by him was passed upon or questioned by any of said officers of the Land Department.

7. The Secretary of the Interior on Feb. 16, 1905, for the first time approved the list of indemnity selections made by the St. Paul and Northern Pacific Railway Company referred to hereinbefore. Prior to said approval the Secretary of the Interior had not in any way authorized or approved the selection of the lands hereinbefore described, by the St. Paul and Northern Pacific Railway Company, or its predecessor, the Western Railway Company of Minnesota, under the grants aforesaid.

8. Following such action of approval a patent of the United States for said lands was, on March 15, 1905, issued to the State of Minnesota describing the same as indemnity lands under the grants of March 3, 1857, March 3, 1865 and March 3, 1871, hereinbefore referred to, for the use and benefit of the railway company legally entitled to the same, and thereafter said patent was delivered to the Governor of the State of Minnesota as the agent of said state.

22 All estate, title and interest of the State of Minnesota in and to any and all lands falling within the provisions of the granting acts aforesaid having been duly conferred on the Western Railway Company of Minnesota, under and by virtue of the provisions of the act of the legislature of Minnesota, dated March 1, 1877, as above stated, and by an assignment by said railroad company transferred to the St. Paul and Northern Pacific Railway Company, the legal title to said lands under the patent in question devolved upon and became vested in said last named company, and its successor in interest, the Northern Pacific Railway Company.

9. Owing to and by reason of the actions of said Register and Receiver and of the Commissioner of the General Land Office and of the Secretary of the Interior, based upon a misconstruction and misinterpretation of the statutes of the United States as aforesaid, this defendant has been deprived illegally and unjustly of his right and claim to said land and of all opportunity to perfect his claim to the same under the homestead laws of the United States. Prior to the issuance of said patent to the State of Minnesota he had complied with all the requirements of said homestead laws and

23 had thereby become entitled to have a patent for said lands from the United States issued to him in accordance with the provisions of Section 2289 and following sections of the Revised Statutes of the United States, as amended by the Congress of the United States.

Wherefore, defendant asks judgment against plaintiff as follows:

1. That plaintiff's prayer and demand in the foregoing action be refused, rejected, overruled and denied, and that said St. Paul and Northern Pacific Railway Company, its successors in interest, the Northern Pacific Railway Company, be held trustee of the legal title to said lands for the use and benefit of this defendant.

2. That said St. Paul and Northern Pacific Railway Company, and its successors in interest, the Northern Pacific Railway Com-

pany, be required by the decree and order of this Court to convey the fee simple title to said lands to this defendant for his own use and benefit by proper deeds of conveyance.

That this defendant have judgment against said plaintiff for his costs and disbursements herein, and for such other and further relief as the equity of the case may require, and as to this Court may seem right, just and proper.

P. B. GORMAN,
Attorney for Defendant, St. Cloud, Minn.

(Verified.)

24 *Demurrer to Answer.*

(Title of Cause.)

Now comes the above named plaintiff and demurs to the answer of the defendants herein, for the reason that said answer does not state facts sufficient to constitute a defense or a counterclaim.

C. W. BUNN,
M. T. SANDERS,
Plaintiff's Attorneys, 211 Northern Pacific Railway Bldg., St. Paul, Minnesota.

Dated Oct. 25, 1907.

Order Overruling Demurrer.

(Title of Cause.)

The plaintiff in the above entitled action having duly demurred to the answer of the defendants therein, and said demurrer having duly come on for hearing before the Court, and having been duly argued and submitted, M. T. Sanders, Esq., appearing as attorney for the plaintiff in support of said demurrer, and P. B. Gor-
25 man, Esq., appearing as attorney for the defendants in opposition thereto, and the same having been duly considered by the Court:

It is Ordered, that said demurrer be and the same hereby is overruled.

Dated St. Cloud, Minnesota, January 18, 1908.

By the Court:

M. D. TAYLOR,
District Judge.

NOTE.—Railroad indemnity lands. December 31, 1877, the company filed a selection list including the lands in controversy. December 4, 1889, it filed an amended selection list. February 12, 1892, it filed a rearranged selection list. No approval of any of these lists was made by the Secretary of the Interior until February 16, 1905, after which the lands were patented to plaintiff.

Defendant, a duly qualified home-steader, settled upon the land in controversy in 1899 and ever since has resided upon and culti-

vated the same, and now has improvements thereon of the value of $1,200.00. In 1899 he duly applied to make homestead entry of the land, but his application was rejected by the local land
26 office on account of these railroad selections. He appealed to the Commissioner of the General Land Office who also rejected his application for the same reason. He appealed to the Secretary of the Interior who again rejected his application on the same ground.

Defendant has complied with the homestead law and is entitled to the land unless these unapproved selection lists segregated it from the public domain so that it was not subject to homestead entry. What is the effect of such lists before they are approved by the Secretary? Do they bar settlers from acquiring homestead rights? Is such a list a mere proposal to take such lands as indemnity and of no effect until approved by the Secretary, or does the company by filing it remove all the lands included therein from the operation of the public land laws without such approval? If the latter rule obtains, the company, of its own volition, may tie up the entire mass of lands out of which indemnity may be selected, for an indefinite period (in this case nearly thirty years) and until the Secretary shall approve or disapprove the proposed selection.

In Sjoli v. Dreschel, 199 U. S. 564, 50 L. Ed. 311, the court say that from the numerous cases in that court the following propositions are deduced:

27 "That no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior; that up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the preemption and homestead laws of the United States; and, that the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road."

It is sought to distinguish this case from the case at bar because Sjoli settled upon the land prior to the filing of the selection list. But this list was filed some four years before Sjoli made his homestead application and the decision of the state court appealed from was based on the ground that Sjoli had lost his settlement right by failing to make application within the statutory time. The reviewing court do not hold that this was error, but hold that the selection list, unapproved, created no right in the com-
28 pany, did not withdraw the land from homestead entry, and was no bar to Sjoli's homestead application at the time such application was made. The decision apparently assumes, as held by the state court, that Sjoli had lost any right he may have had on account of settling on the land prior to the filing of the selection list by failing to make entry within the statutory time of three months.

In Wisconsin Central R. R. Co. v. Price County, 133 U. S., 496; 33 L. Ed., 687, the Court say:

"The approval of the Secretary was essential to the efficacy of the selections, and to give the Company any title to the lands selected. His action in that matter was not ministerial but judicial. * * * And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and, if so, what portion had been thus appropriated, and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the state, but for the protection of the United States against an
29 improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States."

This language is approved and applied in Humbird v. Avery, 195 U. S., 480; 49 L. Ed., 286.

In the case at bar the wording of the act as to selecting indemnity is substantially the same as that construed in Wisconsin Central R. R. Co. v. Price Co., supra, and differs somewhat from that construed in the Sjoli case, but no distinction is made on account of the difference in verbiage.

In United States v. Missouri, K. & T. Ry. Co., 141 U. S., 358; 35 L. Ed., 766, the court say that there is no escape from the conclusion that the lands in question, "if no rights had attached to them before their selection with the approval of the Secretary of the Interior,—could have been legally selected as indemnity
30 lands for that company. We say, prior to such selection and approval, because as to lands which may legally be taken for purposes of indemnity the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted, but, in the fullest legal sense, remains in the United States, until they are actually selected and set apart, under the direction of the Secretary of the Interior, specifically for indemnity purposes."

In Oregon & C. R. R. Co. v. United States, 189 U. S., 103; 47 L. Ed., 726, the Court say:

"It is sufficient to say that the railroad company did not, by the order of 1870, relating to lands within the indemnity limits, acquire an interest in any particular odd-numbered sections within those limits; nor did that order prevent the bona fide occupancy by settlers of odd-numbered sections within such limits up to the time of approval of selections made by the railroad company of lieu lands to supply any deficit in the place limits."

It is insisted that the approval of the selection list, when made, related back to the date when the list was filed. But if the land re-

mained subject to homestead entry, as the foregoing deci-
31 sions indicate, and a valid homestead right had attached, I do not understand how it could be canceled and annulled by a subsequent approval of the list.

M. D. T.

Filed Jan. 20, 1907.
PETER O. SCOW, *Clerk*.

Notice of Appeal.

(Title of Cause.)

To Fred Wass and Pauline Wass, his Wife, Defendants, and P. B. Gorman, Esq., their Attorney, and Peter O. Scow, Clerk of the District Court, Todd County, Minnesota:

Please take notice, That the Northern Pacific Railway Company, plaintiff herein, hereby appeals to the Supreme Court of the State of Minnesota, from the order of the District Court overruling the demurrer interposed by plaintiff to the answer of the defendants herein, made and entered on the 20th day of January, 1908.

Dated March 10, 1908.

C. W. BUNN,
M. T. SANDERS,
Attorneys for Plaintiff, 211 N. P. Gen. Office Bldg., St. Paul, Minnesota.

32 In District Court, Seventh Judicial District.

STATE OF MINNESOTA,
County of Todd, ss:

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
FRED WASS and PAULINE WASS, His Wife, Defendants.

Findings of Fact and Conclusions of Law.

The above entitled cause, having been brought on for trial at the regular term of the District Court, held in and for the County of Todd and State of Minnesota, on the 15th day of November, 1907, Hon. M. D. Taylor, District Judge, presiding, plaintiff being represented by Charles W. Bunn and M. T. Sanders, as their attorneys, who filed a brief in said case, and defendants being represented by P. B. Gorman, as their attorney, who made an oral argument in said matter, the Court examined the record and all the papers and files in the case and after duly considering the matter, and being fully advised therein, made an order overruling the demurrer to defendants answer filed, as aforesaid, by plaintiff in said case.

From said order of the said district court, sitting within and for said county of Todd as aforesaid, overruling plaintiff's demurrer

plaintiff appealed to the Supreme Court of the State of Minnesota,
and the said case, appealed as aforesaid, being placed on the
33 Calendar of said Supreme Court at the General April Term
A. D. 1908, was on the 14th day of May, argued and submitted, on behalf of the appellant (Plaintiff in the court below) by their General Solicitor Charles W. Bunn, and on behalf of Respondents (Defendants in lower Court) by their attorney P. B. Gorman, and the said Supreme Court of the State of Minnesota, after examining the record, and all papers and files in the case, and after being fully advised in the premises and mature deliberations, thereupon had adjudged, determined, decreed and ordered that the Order of the Court below, herein appealed from, be, and the same is, in all things affirmed, and that the respondents have judgment accordingly.

And it was further determined and adjudged, that the respondents do have and secure of said Northern Pacific Railway Company, appellant herein, the sum of sixty-three and no hundre-ths dollars ($63.00) costs and disbursements in this cause, in the said Supreme Court, and that said respondents have execution for the enforcement thereof.

Pursuant to the aforesaid judgment, order, and decree of the said Supreme Court of the State of Minnesota and of the statutes in such cases, made and provided, after duly considering the record, all papers and files in the case, and being fully advised in all matter therein anywise appertaining and there being no reply filed in said case by plaintiff, or by anyone in his behalf, although more than twenty days have elapsed since the order, judgment and decree of said Supreme Court of the State of Minnesota, was filed and since notice thereof was duly served on Plaintiff-Appellant by Defendant's attorney, The Court finds as

34 *Matters of Fact*

that on the 4th day of December, 1899, the southeast quarter (S. E. ¼) of Section thirteen (13) township one-hundred twenty-nine (129) north of range thirty-two (32) west of the fifth (5) principal meridian, St. Cloud (now Duluth) Land District, was surveyed public lands of the United States, lying and being within the twenty (20) miles indemnity limits of the grant made to the territory of Minnesota, by act of congress approved March 3, 1857, (11 Stat. 195) for the purpose of aiding in the construction of railroads from Stillwater, by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood River, with a branch line via St. Cloud and Crow Wing, to the navigable waters of the Red River of the North, at such point as the legislature of said territory may determine, also within the indemnity limits of the grant made to the state of Minnesota for the same purpose, by the act of congress, approved March 3, 1865 (13 Stat. 526 as amended by the act of Congress approved March 3, 1871 (16 Stat. 588).

That all right, title, and interest of the State of Minnesota, in and to the above described land, by reason of the act of Congress

above referred to, were conferred, by the act of the legislature of the State of Minnesota dated March first (1) 1877, on the Western Railroad Company of Minnesota, and subsequently by said Western Railroad Company assigned and transferred to the St. Paul and Northern Pacific Railroad Company, and thereafter, by said last named company, assigned and transferred to the Northern Pacific Railway Company, Plaintiff-Appellant herein.

35 That in the month of April, 1899, defendant, Fred Wass, being then, as now, a citizen of the United States and a resident of the State of Minnesota over the age of twenty-one years, the head of a family, not the proprietor of more than one hundred sixty (160) acres of land in any state or territory, entered upon, took possession of, and made a settlement on the lots of land above described, with the *bona fide* intention of entering the same under the homestead laws of the United States, and that ever since said date, he, the defendant, herein has maintained his said possession and use of said tracts, as a homestead and has resided there on and used the same as his only home; that he has cultivated said lands each year since settling thereon as aforesaid and has otherwise improved the same, that the improvements made and placed upon said lands by this defendant are of the reasonable value of twelve hundred (1200) dollars and that tracts of land themselves, in their improved state are of the value of twenty-five hundred dollars (2500).

That on the 4th day of December, 1899, defendant, Fred Wass, presented to and filed with the register and Receiver of the United States Land District of St. Cloud (now Duluth) in the State of Minnesota, within which land district said lands are located, a proper and legal application to enter said lands under the homestead laws of the United States, and accompanied such application by all the required proofs of his qualifications and acts as a homestead claimant, and at the same time tendered to the Receiver of said land Districts, the lawful fees and commissions properly chargeable upon the allowance of such application. That said register and receiver received and filed said application, and on the same day re-

36 jected the same and refused to receive the fees and commissions tendered by defendant, basing such refusal and rejection upon the sole grounds that the lands applied for were embraced in a then pending, though unapproved, selection applied for by the St. Paul and Northern Pacific Railroad Company. That the rejection of defendant's application for said lands as a homestead, was subsequently, on appeal, affirmed by the Commissioner of the General Land Office and by the Secretary of the Interior, respectively. That the Secretary of the Interior, on February 16, 1905, for the first time approved the selection of the above described tracts by the St. Paul and Northern Pacific Railroad Company, as indemnity land; that prior to said approval of the Secretary of the Interior, on February 16, 1905, as aforesaid, the said Secretary had not, in any way, authorized or approved the selection of the lands hereinbefore described, by any railroad company, whatever, under the grants aforesaid; that a patent of the United States for said lands was, on March 15th, 1905, issued to the State of Minnesota, designating the same as indemnity lands under the grants of March 3, 1857, March

3, 1865 and March 3, 1871, hereinbefore referred to, for the use and benefit of the railroad company legally entitled to the same, and that thereafter said patent was delivered to the Governor of the state of Minnesota as the agent of said state.

That all estate, title and interest of the state of Minnesota, in and to any and all lands falling within the provisions of the granting acts aforesaid, having been duly conferred on the Western Railroad Company of Minnesota, under and by virtue of the provisions of the act of the legislature of Minnesota, dated March 1, 1877,
37 as hereinbefore stated, and by an assignment of said railroad company, transferred to the St. Paul and Northern Pacific Railroad Company and by said last named Company, assigned and transferred to the plaintiff herein, the legal title to said lands under the patent in question became vested in the Northern Pacific Railway Company.

And the Court further finds as

"Conclusions of Law

that in the month of April 1899, when defendant, Fred Wass, settled upon the land above described, and in December of the same year, when he presented to the Register and Receiver of the St. Cloud, Minnesota Land District, his homestead application, as aforesaid, he, said defendant, was a citizen of the United States and a resident of the state of Minnesota, living in the said County of Todd and, in all respects was a qualified claimant to enter vacant government land under the homestead law. That the approval of the Secretary of the Interior, of the application of the Railroad Company, to select the said land, under the indemnity provision of their grant, after the settlement thereof of defendant and after his application, made as aforesaid, to enter the same, as a homestead, was erroneous and in violation of the homestead law.

That the application of the railroad company to select said tracts of land, under and pursuant to the provisions of their land grant, not having been approved by the Secretary of the Interior as required by law, or otherwise, prior to the 16th day of February, 1905, the above described tracts of land, and each and every part and
38 parcel thereof, was unappropriated, unreserved, vacant government land and the same was subject to entry under and pursuant to the homestead laws of the United States, in the month of April 1899, when defendant established his residence thereon, and on the 4th day of December, of the same year 1899, when defendant presented his homestead application, for said land, to the Register and Receiver of the St. Cloud Land District at St. Cloud, Minnesota;

That the rejection of the defendant's said homestead application, made as aforesaid, at St. Cloud, Minnesota Land Office, on the 4th day of December 1899, by the Register and Receiver of said Land Office, and subsequently, on appeal, by the Commissioner of the General Land Office, and later by the Secretary of the Interior, re-

spectively, was erroneous and in conflict with the provisions of law, in such cases made and provided;

That defendant's homestead application for said land, when presented as aforesaid, to the Register and Receiver of the said St. Cloud Land Office, on the 4th day of December, 1899, should have been accepted, approved and allowed, and placed of record, and the Receiver's Receipt therefor issued to and in the name of Defendant;

That the presentation of Defendant's homestead application for said land, as aforesaid, together with his tender of legal fees and commissions properly chargeable on the allowance of the same, taken in connection with his settlement and residence thereon, and with his improvement and cultivation of the same, operated to vest the equitable title of said land in defendant, in the same manner and to the same extent as would have been the case, had the said homestead application been accepted, approved, allowed and placed of
30 record, by said Register and Receiver, and the usual receiver's receipt issued therefor to defendant;

And that the said Northern Pacific Railway Company, holds the legal title to said lands as trustee for the use and benefit of Fred Wass, defendant herein;

That the plaintiff's prayer, request, and demand, in his complaint contained in the above entitled cause must be denied, refused, over-ruled, and rejected, that the said plaintiff must be ordered and required to convey to Fred Wass, defendant herein, by good and sufficient deeds of conveyance, the legal title to said above described land, to-wit: that southeast quarter (S. E. $\frac{1}{4}$) of Section thirteen (13) township one hundred twenty-nine (129) north of range thirty-two (32) west, of the fifth (5) principal meridian, Minnesota, containing one hundred sixty acres (160) more or less according to the government survey thereof.

To have and to hold together with all hereditaments and appurtenances thereto belonging or in any way appertaining unto the said Fred Wass, his heirs and assigns absolutely and forever.

That defendant have judgment for his costs and disbursements herein and execution for the enforcement thereof.

Dated Fergus Falls, Minn. July 28, 1908.

Let judgment be entered accordingly.

By the Court.

L. L. BAXTER,
District Judge.

Clerk's Office, Filed July 29, 1908.
PETER O. SCOW, *Clerk.*

40 STATE OF MINNESOTA,
County of Todd, ss:

I, Peter O. Scow, Clerk of District Court, in and for Todd County, State of Minnesota, do hereby certify that I have compared the foregoing paper writing with the original findings of fact and conclusions of law—Northern Pacific Railway Company, vs. Fred Wass and Pauline Wass, his wife—in the action therein en-

titled, now remaining of record in my office, and that the same is a true and correct copy of said original and the whole thereof.

Witness my hand and the seal of said Court, at Long Prairie, this 3rd, day of October, A. D. 1908.

[Seal District Court, Todd Co., Minn.]

PETER O. SCOW,
Clerk of District Court.
By CARRIE C. HANSMEYER, *Deputy.*

41 [Endorsed:] Nos. 3872. State of Minnesota, County of Todd, District Court, Seventh Judicial District. Northern Pacific Railway Company, a corporation, Pl'ffs vs. Fred Wass and Pauline Wass, his wife, Defendants. Findings of the Court. P. B. Gorman, Att'y for Defendants. St. Cloud, Minn.

42 STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the findings of fact and conclusions of law in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol in the city of St. Paul, this 15th day of March A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

43 STATE OF MINNESOTA,
County of Todd, ss:

District Court, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY CO., Plaintiff,
vs.
FRED WASS and PAULINE WASS, Defendants.

Judgment and Decree.

The plaintiff in the above entitled cause having duly demurred to the Answer of the defendants herein, and said demurrer having duly come on for hearing before the Court, at the regular November 1907, term of said Court, within and for the said County of Todd and State of Minnesota, Hon. M. D. Taylor one of the judges of the said Court presiding, and having been duly argued and submitted, M. T. Sanders, Esq., appearing as attorney for plaintiff, in support of said demurrer, and P. B. Gorman Esq., appearing as attorney for defendants in opposition thereto the said Court being fully advised therein, and

mature deliberation therein had, did on the twentieth (20) day of January, 1908, file an order overruling said demurrer.

Plaintiff having appealed to the Supreme Court of Minnesota, from the aforesaid Order of the District Court, over-ruling said demurrer, and said appeal in said matter being brought on for hearing before the said State Supreme Court at the general April 1908 term of said Court, and being duly argued and submitted, the full court
44 presiding, Judge Charles W. Bunn, appearing as attorney for plaintiff in support of said appeal, and P. B. Gorman, Esq., appearing as attorney for defendants, in opposition thereto, the said Court being fully advised in said matter, after mature deliberation thereto had, determined, adjudged, decreed, and ordered, that, the order of said District Court herein appealed from by plaintiff, be, and is, in all things affirmed, and said Supreme Court further determined, adjudged, decreed and ordered that defendants have judgment against plaintiff for the sum and amount of sixty-three — ($63.00) costs in said Supreme Court.

No pleading of any kind whatever, except said demurrer having been served in reply, or otherwise, to defendants Answer, and more than twenty days having elapsed since the making and filing of judgment, Order and Decree of said Supreme Court, and since notice thereof, was duly served on plaintiff's said Attorney, by said attorney for defendants, and the said District Court within and for said County of Todd, Hon. L. L. Baxter, one of the Judges of said Court presiding having on the twenty-ninth (29th) day of July, 1908, filed its findings of fact and its conclusions of law, together with its order in said matter, now, therefore, in pursuance of said order, and of the mandate of the Supreme Court of Minnesota, dated on the 26th day of June 1908, and filed in this office on the 29th day of July 1908.

And on motion of P. B. Gorman, attorney for defendants, it is determined, adjudged, and decreed and ordered, that the equitable title of the said land, to wit: the southwest quarter (SW. ¼)
45 of section thirteen (13), township one-hundred twenty-nine (129), north of range thirty-two (32), west of the fifth (5th) principal meridian, containing one-hundred sixty acres (160), more or less according to the government survey thereof, is in the defendant, Fred Wass, under and by virtue of the homestead laws of the United States, that the legal title of the said land is in the Northern Pacific Railway Company under and by virtue of the patent therefor of the State of Minnesota; That said Northern Pacific Railway Company, plaintiff herein, holds the said legal title in and to the herein before described land as trustee to the use and benefit of defendant Fred Wass; and, that the Northern Pacific Railway Company is hereby directed, ordered, and commanded to assign, transfer and convey unto the aforesaid defendant Fred Wass, the legal title to the said land and to all and each and every part and parcel thereof, by good and sufficient deed of conveyance.

To have and to hold, together with all the hereditaments and appurtenances thereunto belonging and in anywise appertaining,

unto the said defendant, Fred Wass, his heirs and assigns, absolutely and forever.

And it is further determined, adjudged, decreed, and ordered, that defendants have judgment against the plaintiff for the sum and amount of eighty-three and 55/100 Dollars as costs and disbursements herein, said sum including sixty-three ($63.00) Dollars, the amount taxed and allowed in Supreme Court of the State of Minnesota as per mandate of said Court, herewith filed.

Dated July 29th, 1908.

[District Court Seal.]

PETER O. SCOW,
Clerk of Court.

Clerk's Office, filed July 29th, 1908.
PETER O. SCOW, *Clerk.*

46 STATE OF MINNESOTA,
County of Todd.

District Court, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY CO., Plaintiff,
vs.
FRED WASS and PAULINE WASS, Defendants.

It is stipulated that on the appeal to the Supreme Court from the judgment entered herein July 29, 1908, the return of this Court to the Supreme Court made upon the appeal heretofore taken from the order entered herein over-ruling the plaintiff's demurrer shall, together with certified copy of the judgment since entered and of the notice of the appeal from the judgment now taken and the waiver of bond, constitute the return for the purpose of the appeal from the judgment.

Dated October 1, 1908.

CHARLES W. BUNN,
Attorney for Plaintiff.
P. B. GORMAN,
Attorney for Defendants.

Clerk's Office, filed Oct. 2nd, 1908.
PETER O. SCOW, *Clerk.*

47 STATE OF MINNESOTA,
County of Todd:

District Court, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY CO., Plaintiff,
vs.
FRED WASS and PAULINE WASS, his wife, Defendants.

At the request of the plaintiff the defendants hereby waive the giving of bond by plaintiff on appeal to the Supreme Court from the judgment entered herein July 29, 1908.
Dated September *30*, 1908.

P. B. GORMAN,
Attorney for Defendants.

Clerk's Office, filed Oct. 2nd, 1908.
PETER O. SCOW, *Clerk.*

48 STATE OF MINNESOTA,
County of Todd:

District Court, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
FRED WASS and PAULINE WASS, his wife, Defendants.

To P. B. Gorman, Esq., Attorney for Defendants.

SIR: Please take notice that the plaintiff appeals to the Supreme Court from the judgment entered herein on the 29th day of July, 1908, in favor of defendants and against plaintiff. Dated September 30, 1908.

CHARLES W. BUNN,
Attorney for Plaintiff.

Clerk's Office, filed Oct. 2nd, 1908.
PETER O. SCOW, *Clerk.*

Service of the above Notice admitted this 3rd day of October, A. D. 1908.

[District Court Seal.]

PETER O. SCOW,
Clerk of District Court, Todd Co., Minn.
By CARRIE C. HANSMEYER,
Deputy.

49 STATE OF MINNESOTA,
County of Todd, ss.

I, Peter O. Scow, Clerk of District Court, within and for said County of Todd and State of Minnesota, do hereby certify that I have compared the foregoing paper writing, with the original judg-

ment and Decree, Notice of Appeal, Waiver of Bond and Stipulation, Northern Pacific Railway Company vs. Fred Wass and Pauline Wass, his wife in the action therein entitled now remaining of record in my office, and that the same is a true and correct copy of said original and the whole thereof.

Witness my hand and the seal of said Court at Long Prairie, this 3rd, day of October, A. D. 1908.

[District Court Seal.]

PETER O. SCOW,
Clerk of District Court.
By CARRIE C. HANSMEYER,
Deputy.

50 STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the judgment and decree in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 15th day of March, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

51 16027.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1908.

No. 262.

NORTHERN PACIFIC RY. CO., Appellant,
v.
FRED WASS and PAULINE WASS, His Wife, Respondents.

Per Curiam:

This is an appeal from the judgment of the district court of the county of Todd in favor of the defendants. The record herein presents for our decision the precise question determined, adversely to the appellant, by this court upon a former appeal herein from an order overruling a general demurrer to the defendant's answer. Northern Pacific Ry. Co. v. Wass (Minn.) 116 N. W. R. 937. We adhere to our former decision, and hold, for the reasons stated in the opinion on the former appeal, that the judgment appealed from must be affirmed. So ordered.

52 15625.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1908.

No. 160.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
v.
FRED WASS and PAULINE WASS, His Wife, Respondents.

Syllabus.

On the authority of Sjoli v. Dresbeel, 199 U. S. 564, and Hoyt v. Weyerhaeuser, filed April 17, 1908, by the United States Circuit Court of Appeals, 8th Circuit, Held:

Under the provisions of the acts of Congress, approved March 3, 1857, and March 3, 1865, as amended by the act approved March 3, 1871, that until the Secretary of the Interior approves of the list filed by the railroad company, designating indemnity lands, such lands are not segregated from the public domain, and are subject to entry under the homestead laws, although the list may have been filed prior to the date of settlement on the land by the homesteader.

Affirmed.

53 15625.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1908.

No. 160.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
v.
FRED WASS and PAULINE WASS, His Wife, Respondents.

Opinion.

Action in ejectment by appellant to recover possession of a quarter section of land in Todd County. Appellant claims title under the acts of Congress, approved March 3, 1857, and March 3, 1865, as amended by the act approved March 3, 1871. These acts contain what are known as the Northern Pacific land grants. Respondents claim right of possession under and by virtue of a settlement under the United States homestead laws, and appellant relied upon its patent title. Appellant demurred to respondents' answer upon the ground that it did not state facts sufficient to constitute a cause of action, and appealed from an order of the trial court overruling the same.

The facts as presented by the answer are as follows: The land is within the indemnity limits of the grant referred to. A list of lands, including the tract in question and purporting to be a list of selections under the indemnity provision, was filed December 31, 1877. An amended selection list, including the tract involved, was filed December 4, 1889. A re-arranged list of indemnity selections, embracing the disputed tract, was filed in the St. Cloud land office on February 12, 1892, wherein, for the first time, was designated a proper basis for each tract so selected. In April 1899, re-
54 spondent, Fred Wass, being duly qualified, made settlement on the land with the bona fide intention of entering the same under the homestead laws, and has ever since maintained such possession and resided thereon as his homestead, and has made improvements exceeding $2500, in value, and on the 4th of December 1899, presented to and filed with the register and receiver of the United States land office at St. Cloud, a proper and legal application to enter such land under the homestead laws. The application was received and filed, but was rejected upon the ground that the land applied for was embraced in a then pending, though unapproved, indemnity selection of the St. P. & N. P. Ry. Co. Respondent appealed to the Commissioner of the general land office, and on July 10, 1903, that officer affirmed the decision of the local land officers, and rejected his application upon the same ground. He appealed to the Secretary of the Interior, who, January 9, 1904, affirmed the decision of the Commissioner on the ground stated. On February 16, 1905, the Secretary of the Interior, for the first time approved the list of indemnity selections made by the railway company, and on March 15, 1905, patent was issued to the state of Minnesota describing the same as indemnity lands under the provisions of the aforesaid grants, and appellant succeeded to all of the right, title and interest of the several grantees named in the several acts of Congress, and the legal title vested in appellant.

The only question involved is whether the land was open to settlement under the United States homestead laws, between the date of filing the proper list of selection and the date of approval thereof by the Secretary of the Interior. It is conceded by the demurrer that a proper list of selection was filed with the
55 Secretary of the Interior on the 12th of February 1892; that respondent settled on the land in April 1899, made application to enter the land under the homestead law December 4, 1899, and that the selection was finally approved February 16, 1906.

The trial court based its decision in overruling the demurrer upon the case of Sjoli v. Dreschel, 199 U. S. 564, wherein the facts were as follows: The railroad company filed the map designating its definite route, November 21, 1871, which map and location was approved December 25th following. On June 19, 1885, the company filed its list of selections, at the proper land office, which list was rejected as to the land involved in that suit. In July 1885, the company appealed from that decision. In 1889 Sjoli applied to the proper land office to enter the land under the homestead laws, and his application was rejected upon the ground that the land was

considered to be within the indemnity limits. In January 1895, Sjoli again made application at the land office to enter the land as a homestead, at which time his application was received and patent was issued to him June 18, 1901. It will be observed that the facts in the Sjoli case differ from the case now before us in the following respects: Sjoli had settled on the land prior to the filing of the list of selections, and had attempted to enter the same under the homestead law in 1889; whereas in the case before us, respondents did not settle on the land until after the filing of the list. In the Sjoli case, at the time of the trial it did not appear that the list had ever been approved by the Secretary of the Interior. In the present case the list of selections was approved. In the Sjoli case a patent had issued to him, while in this case respondent's application was
56 never allowed, but the selection of the railway company was approved and a patent issued to appellant prior to the time of the commencement of this action. In the Sjoli case the Federal Supreme Court laid down four general propositions: (1) That as to place lands, the grant took effect upon the definite location of the railroad, and the filing and acceptance of the map, and that thereby such lands became segregated from the public domain. (2) That no right to land within the indemnity limits attached in favor of the railroad company "until after selections made by it with the approval of the Secretary of the Interior." (3) "That up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, were subject to be disposed of by the United States, or to be settled upon and occupied under the preemption and homestead laws of the United States." (4) "That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road." In applying those propositions to the facts of the case, the court said: "We have seen that Sjoli's settlement upon the land was in 1884, and his original application to enter it was in 1899; whereas the railroad company made and filed its list of selections of lands within indemnity limits to supply alleged deficiencies in place limits in 1885, Sjoli being still in occupancy of the land. But, as already stated, the result of the cases in this court is that the railroad company did not acquire an interest in any particular lands within the indemnity limits merely by filing its lists of selections nor until its selections were approved by the Secretary of the Interior." Again: "So that when
57 Sjoli settled upon the land it was, so far as the railroad company was concerned, part of the unappropriated public lands open to settlement under the homestead laws. The railroad company had no direct legal interest in it. The company's unapproved selections did not, therefore, stand in the way of the lands being occupied and entered under the homestead laws. The mere filing of its lists of selections of indemnity lands did not have the effect to exclude them from occupancy under the preemption or homestead laws. On the contrary, notwithstanding the filing of such lists, they remained open, as before, to settlement or occupancy under those laws, until the selections were formally approved by the

Secretary of the Interior and the lands withdrawn from settlement or sale." Appellant has called our attention to several cases referred to in the opinion, and in the marginal note of the report, and submits that the court could not have intended to place its decision upon the specific ground that the list had not been approved, although it had been filed at the time Sjoli made settlement upon the land. Counsel argue, with great force, that the case was rightly disposed of upon the ground that settlement antedated any action by the company to cause the indemnity lands to be segregated, and that the point involved in the present case was not necessarily passed upon.

In order that our position may be entirely clear, we will refer to some of the cases upon which the Sjoli decision was based. In Hewitt v. Schultz, 180 U. S., 139, the court held that under the act of July 2, 1864, the Secretary of the Interior had no authority to withdraw all of the lands included within the indemnity limits, and that until a valid selection was made by the grantee, the lands within the indemnity limits were open to disposition by the
58 United States. The court stated the proposition as follows: "Was it competent for the Secretary of the Interior immediately upon acceptance of the map of definite location to include in his withdrawal from sale, or entry, lands within the indemnity limits?" The decision was by a divided court, and the majority considered the question not free from doubt, but under the circumstances gave great weight to the opinion of the department which was charged with the execution of the statute, the Secretary of the Interior having delivered an opinion to the effect that the entire amount of lands within the indemnity limits could not be withdrawn. Oregon & C. R. R. Co. v. United States, 189 U. S., 103, was a case wherein the settler filed upon the land before the list of selections was filed, and the case seems to have been disposed of on that particular ground. The court say: "These principles are applicable to the present case if, as contended by the United States, the railroad company did not acquire, and could not have acquired, an interest in specific sections of land within the indemnity limits before their actual and approved selection, under the direction of the Secretary prior to the date of occupancy by the respective settlers." And again: "Now it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits, which interest relates back to the date of the granting act, the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the land
59 department and then its right relates to the date of the selection." By this language it would seem that the court did not mean that the filing of the list by the company was of no effect whatever, because it was stated that upon approval, its right relates back to the date of selection—that is, the first step in making the selection—the filing of the list. The court's conclusion is specifically stated as follows (p. 115): "We adjudge that the rights which

bona fide occupancy gave to the settler under the act of 1866 are not defeated by a mere selection afterwards of the lands by the railroad company—the settler having, after the lands are surveyed, promptly taken the necessary steps to protect his rights under the homestead laws." The court subsequently applied the fiction of relation in United States v. Anderson, 194 U. S., 394, and held, that although the legal title was in the United States during the time intervening between filing and approval of the list, yet the successor in interest of the railroad company, the lands having been approved, was permitted to recover from the government the amount which it had recovered as damages from a trespasser upon the land during that intervening period. It was held in St. Paul & Sioux City Railroad Company v. Winona & St. Peter R. R. Co., 112 U. S., 720, that the railroad company acquired no vested interest in the lands within the indemnity limits by the mere filing of the map of its line of railroad, and said: "Was there a vested right in this company, during all this time, to have not only these lands, but all the other odd sections within the twenty mile limits on each side of the line of the road, await its pleasure? Had the settlers in that popu-
60 lous region no right to buy of the government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation, and forbidden to cultivation? It is true that in some cases the statute requires the land department to withdraw the lands within these secondary limits from market, and in others the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain their deficiencies and make their selections. It by no means implies a vested right in said company, inconsistent with the right of the government to sell, or of any other company to select, which has the same right of selection in such case, and having no right, is bound to exercise that right with reasonable diligence; and when it is exercised in accordance with the statute, it becomes entitled to the lands so selected. The unascertained float then becomes a vested right to an identified tract of land." It would seem that the court recognized that the company must have reasonable time, after filing its list, to secure the approval thereof by the party designated for that purpose in the granting act. That a vested right or interest is different from an inchoate, contingent right, or, as above stated, "a float," is apparent from a consideration of the Wisconsin Central Railroad Company v. Price County, 133 U. S., 496, where it was held that until the lands were formally approved by the Secretary of the Interior, the railroad did not acquire such a vested right as made the lands subject to taxation. In speaking of a simi-
61 lar question in United States v. Missouri K. & T. Ry. Co., 141 U. S., 358, the court used the following language: "We say, prior to such selection and approval, because as to lands which may legally be taken for purposes of indemnity the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted,

but, in the fullest legal sense, remains in the United States, until they are actually selected and set apart, under the direction of the Secretary of the Interior, specifically for indemnity purposes." In Humbird v. Avery, 195 U. S., 480, the court cited from Wisconsin R. R. Co. v. Price County, supra, as follows: "Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts." Our attention has also been called to the fact that Mr. Justice Moody, when Attorney General, advised the Secretary of the Interior that the Sjoli decision applied only to those cases wherein it appeared that the rights of the settler took effect prior to the time of the filing of the list.

We have carefully considered the cases above referred to, among others, and while it is true that the rights of a homesteader who made settlement after the date of filing the list, was not directly presented by the facts in the Sjoli case, nor in any of the decisions upon which it was apparently based, yet the propositions of
62 law are so clearly announced that we cannot avoid the conclusion that it was the intention of the court to decide that the railroad company acquired no rights whatever for any purpose until the approval of the list by the Secretary of the Interior; that it was the intention of the court to hold that the grant applied to such lands only as might be found unappropriated within the place limits upon the filing and approval of the map designating the location of the road, and that the company was merely given an opportunity to supply the deficiency, if any, from the so-called indemnity limits; that the Secretary of the Interior and not the company should do the selecting; that, conceding the Secretary was not required to act at all until the company made preliminary selection, setting off tract against tract, still, after the company had done all in its power to bring the matter before the Secretary, that officer might dispose of it at his convenience; that although the Secretary had reasonable time to examine into the facts and determine disputed questions, notwithstanding such contingencies and delays, the land was subject to settlement in the meantime, and the attempt of the company to secure the same was without avail. Such, we understand to be the effect of the decision, and while doubtful that such granting acts as theretofore construed by that court, and by the land department, were authority for the conclusion reached, we feel compelled to accept the decision as conclusive in the case before us. We are justified in this view by the recent decision of the Circuit Court of Appeals, 8th Circuit, in the case of Hoyt v. Weyerhaauser, where that court construed the opinion in Sjoli v. Dreschel, and applied the principles there announced to a case similar to this.

Affirmed.

63 STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the opinion of the Supreme Court of Minnesota in 116 N. W. R. 937 in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 15th day of March, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

64 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1908.

No. 262.

Appeal from District Court, Seventh Judicial District, County of Todd.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
vs.
FRED WASS and PAULINE WASS, His Wife, Respondents.

This cause having been duly argued and submitted at the General October Term of this Court, A. D. 1908, upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby is, in all things affirmed and that the Respondents above named have judgment accordingly.

Entered October 7th, A. D. 1908.

By the Court,

Attest:

C. A. PIDGEON, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

C. A. PIDGEON, *Clerk.*

65 [Endorsed:] No. 16027. State of Minnesota Supreme Court. Copy of order for judgment. Filed October 7th, A. D. 1908. C. A. Pidgeon, Clerk.

29

FILED.
DEC 6 1909
JAMES H. McKENNEY,
CLERK.

SUPREME COURT
of the
UNITED STATES,
October Term, 1909.
No. [illegible] 12.

CHARLES D. CAMPBELL,
Appellant,

VS.

JOHN A. HUMBIRD and
FREDERICK WEYERHAUSER,
Appellee.

BRIEF OF
CHARLES D. CAMPBELL,
Appellant.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

H. H. HOYT,
Solicitor for Appellee.

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SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, A. D. 1909.

No. 176.

CHARLES D. CAMPBELL, Appellant.

vs.

JOHN A. HUMBIRD & FREDERICK WEYERHAUSER, Respondents.

BRIEF FOR APPELLANT.

The contention in this case, is in respect to the title to the Southeast Quarter of Section 21, Township 54, North, Range 12, West, Duluth land district.

The defendants claim title to the land as the grantees of the patentee, the Northern Pacific Railway Company, while the appellant claims to have acquired the equitable title to said land, and entitled to have his title to said land perfected by a decree of this court. The appellant applied to purchase said land under the Act of Congress dated June 3, 1878, as amended by Act of August 4, 1892, Campbell being in all respects duly qualified, filed his application to purchase said land under the provisions of said act, October 26, 1895, the local officers rejected his application for the reason that said land had been selected prior to the application of Campbell by the Northern Pacific Railroad Company, and included in its

list of selections filed in the Duluth Land Office October 17, 1883, said list of selections were re-arranged by said railroad company and filed in the local office April 11, 1893. Campbell renewed his application to purchase said land on November 9, 1896, and again December 28, 1897. These applications were all rejected because of the conflict with the Northern Pacific Railroad Company's prior selection, and appeals taken to the Commissioner of the General Land Office. The land in controversy is within the so-called second indemnity belt of the grant to aid in the construction of the Northern Pacific Railroad, and it is deemed important to refer to the material sections considered as having a bearing on this controversy.

An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the Northern Route. (13 Stat. at L. 365.)

The first section of the Act, mentioned by names 132, individuals who in life were known as politicians, warriors, business men and promoters, and the door left open for all persons who desired to join and be associated with them, they were by said act created and erected into a body corporate and politic—in deed and in law by the name, style and title of the **"Northern Pacific Railroad Company,"** and by that name shall have perpetual succession and shall be able to sue, and to be sued, etc.

And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with

the appurtenances, namely beginning at a point on Lake Superior in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route as shall be determined by said company within the territory of the United States on a line north of the 45th degree of latitude to some point on Puget Sound * * * and is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purpose of this act, as herein set forth.

The capital stock of said company shall consist of one million shares of $100.00 each, which shall in all respects be deemed personal property, and shall be transferable in such manner as the by-laws of said corporation shall provide. * * * The persons hereinbefore named are appointed commissioners, and shall be called the board of commissioners of the Northern Pacific Railroad Company and 15 shall constitute a quorum for the transaction of business. * * * The President and Secretary of the board of commissioners shall appoint a time and place for the first meeting of the stockholders of said company. * * So soon as 20,000 shares shall in good faith be subscribed for, and $10.00 per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers of the stock of said company * * * and such subscribers as shall attend the meeting so called * * * shall elect by ballot 13 directors for said corporation.

At the first meeting of said board of commissioners they shall organize by the choice from its members of a president, vice-president, secretary and treasurer * * * said commissioners, treasurer and secretary, shall then

deliver over to said directors all the properties, subscription-books and other books in their possession and therefore the duties of said commissioners and the officers previously appointed by them, shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate.

SEC. 2.—That the right of way throug the public lands be and the same is hereby granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph line as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road, materials of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of 200 feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, work-shops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations; and the right of way shall be exempt from taxation within the territories of the United States.

SEC. 3.—That there be and is herein granted to the "Northern Pacific Railroad Company," its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway. Every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territory of the United States, and 10 alternate sections of land per mile on each side of said railroad wherever it passes through any state, and

whereveer on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General land office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate section, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections: Provided: That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act. * * * And provided further: That no money shall be drawn from the treasury of the United States to aid in the construction of said "Northern Pacific Railroad."

SEC. 4.—And be it further enacted: That whenever said "Northern Pacific Railroad Company" shall have 25 consecutive miles of any portion of said railroad and telegraph line ready for the services contemplated, the President of the United States, shall appoint three commissioners to examine the same, and if it shall appear that 25 consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of land as aforesaid shall be issued to said company, confirming to said company the right and title to said lands, situated

opposite to and co-terminus with said completed section of said road; and from time to time, whenever 25 additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every 25 miles of said road is completed as aforesaid. Provided that not more than 10 sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order as a first class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota. Provided, also, that lands shall not be granted under the provisions of this act on account of any railroad or part thereof, constructed at the passage of this act.

SEC. 6.—And be it further enacted: That the President of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are conveyed, except by said company, as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on he public domain." Approved May 20, 1862, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those.

SEC. 8.—And be it further enacted, that each and every grant, right, and privilege herein are so made and given to, and accepted by said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the 4th day of July, 1876.

SEC. 9.—And be it further enacted: That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then in such case, at any time hereafter, the United States by its Congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

SEC. 10.—And be it further enacted: That all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital mentioned in this act of incorporation is taken up, by complying with the terms of subscription; and no mortgage or construction bond shall ever be issued by said company on said road, or mortgage or lien made in any way, except by the consent of the Congress of the United States.

SEC. 12.—And be it further enacted: That the acceptance of the terms, conditions, and impositions of this act by the said Northern Pacific Railroad Company shall

be signified in writing under the corporate seal of said company, duly executed pursuant to the directions of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be served on the President of the United States.

SEC. 19.—And be it further enacted: That unless said Northern Pacific Railroad Company shall obtain bona fide subscriptions to the stock of said company to the amount of two million of dollars with 10 per centum paid within two years after the passage and approval of this act, it shall be null and void.

SEC. 20.—And be it further enacted: That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefit of the same for postal, military, and other purposes. Congress may at any time, having due regard to the rights of said Northern Pacific Railroad Company, add to, alter, amend or repeal this act.

Folly and ignorance met in the halls of Congress—ignorance conceived and begot the Northern Pacific Railroad Company. It is a finished product out of the brains of the railroad men in and out of Congress at that time.

Here was an act of Congress granting 50,000,000 acres of the public domain to aid in the construction of the Northern Pacific Railroad, from Lake Superior to Puget Sound, the distance being estimated at 2600 miles, without any indication that among the promoters of this scheme there was one dollar among the whole outfit. Congress however saw fit by Sec. 10, to expressly prohibit

any mortgage or construction bonds ever being issued by this company on said road, nor mortgage, or lien, made in any way, except by the consent of the Congress of the United States." By Section 4 of said act, it was provided that on the completion of 25 consecutive miles of any portion of said road, and it being examined in the manner provided for in said section, patents shall be issued to said company on said sections, but it was further provided "that not more than 10 sections of land per mile, as said road shall be completed for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first class railroad from the point of beginning on Lake Superior to the western boundary of Minnesota."

It was made a condition as it would appear by Sec. 8, of said act, that said Northern Pacific Railroad Company should commence the "work on said road, within two years from the approval of this act by the President, and should not complete less than 50 miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the 4th day of July, 1876." Although we were not then at the age of frenzied finance, even in 1864, a railroad could not be built without money, the road was to run through an unsettled country, inhabited by savage beast, and much more savage men, no pecuniary help could be expected from the country through which the road would pass. I think it could be safely affirmed that the 132 persons, who by the first section of said act were "created and erected into a body corporate and politic in deed and law, by the name and style, and title of the Northern Pacific Company" were more white men in number than would be found within

the lateral limits of this 2200 miles of said road. I submit to the court, that under the act of July 2, 1864, the Northern Pacific Railroad Company was born paralytic, it could not move, it had no money and that is what the railroad companies feed upon. The Northern Pacific Railroad Company lacked it, it was essential to carrying out this scheme. This company was only half made up when ushered into this breathing world, and that so lamely and unfashionable that nothing could be done with it.

When one looks back 45 years and notices that within a few years the government had given away 266,000,000 acres of the public domain to railroad and other corporations, a territory not far in extent from the total area of France and Germany, two countries which support between them a population much greater than the whole population of the United States, nearly nine tenths of all the vast land grants in the United States were made during the Civil War. That was a period of reckless and prodigal expansion which marked the decade which saw the beginning and the end of the rebellion.

From 1864 to 1870, nothing was done by the original promoters of this road, the Northern Pacific Railroad Company, they appeared to have fallen into a state of inocuous desuetude; but on May 31, 1870, another band of patriots, but more thrifty than the first entered upon the scene. They proposed to Congress to take up the work and construct the road. Although at this time, no line of said road had been marked upon the surface of the earth, no work had been done towards its construction, not an acre of land had been earned by the company, they asked Congress to give its consent to the execution of a mortgage upon the lands granted by Congress, which at that time belonged to the United States, and this for

the purpose of raising money, to begin the construction of this road. They also asked for an extention of the indemnity limits, 10 miles on each side of the line of said road beyond the limits of the grant of July 2, 1864.

This action resulted in the passage by Congress of the following joint resolution, the title to which is, "A resolution authorizing the Northern Pacific Railroad Company, to issue its bonds for the construction of its road, and to secure the same by mortgage and for other purposes." The resolution approved May 31, 1870, is in the words and figures following, to-wit:

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled. That the Northern Pacific Railroad be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution, and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to locate and construct under the provisions, and with the privileges, grant, and duties provided in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory, in which said main line or branch may be located, at the time of the final location thereof, the amount of land per mile granted by Congress to said Company, within

the limits prescribed by its Charter, then said Company shall be entitled under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road beyond the limits prescribed in said Charter, as will make up such deficiency, on said main line or branch, except mineral and other lands, as excepted in the charter of said Company of 1864 to the amount of the lands that have been granted, sold, reserved, occupied by homestead settled, pre-empted, or otherwise disposed of. Subsequent to the passage of the Act of July 2, 1864. And that 25 miles of said main line, between its western terminus and the City of Portland, in the State of Oregon, shall be completed by the first day of January, 1872, and 40 miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points.

Provided all lands hereby granted to said company which shall not be sold or disposed of, or remain subject to the mortgage by this act authorized at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars, and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgage land hereby granted, or any of them be sold by the trustees to whom such mortgage may be executed, either at its maturity, or for any failure or default of said company under the terms thereof such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not

less then sixty days previous notice, in single sections or sub-divisions thereof, to the highest and best bidder.

Provided further: That in the construction of the said railroad, America iron or steel only shall be used—the same to be manufactured from American ore exclusively.

Sec. 2. And be it further resolved: That Congress may at any time, alter or amend this joint resolution, having due regard to the rights of said company, and any other parties. (Approved May 31, 1870.) (16 Stat. at L. 378.)

After the passage of the joint resolution of May 31, 1870, authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage and for other purposes, the following action was taken by the Northern Pacific Railroad Company:

The map of the general route of this road was filed in the office of the Commissioner of the General Land Office August 13, 1870. It could not however have been the intention of Congress by the approval of the act of July 2, 1864, to give to the Northern Pacific Railroad Company, the absolute authority to fix the point of the eastern terminus of its road. The charter granted by Congress to said company was in the nature of a contract, to which each party must give its assent to any act that might effect the same in order to give it validity. By granting to this company 50,000,000 acres of the public domain to aid in the construction of its road, the government had a vital interest as to where the eastern terminus of this road should be.

When the Northern Pacific Railroad Company filed its map of its general route, August 13, 1870, fixing its eastern terminus at the mouth of Montreal River (said river being the boundary line between the States of Wisconsin and Michigan) it was thus chosen, because it was the farthest point the company could extend its road and obtain land.

Although the point was on Lake Superior, it was in a wilderness and entirely unsuitable for the termination of a railroad; the land department without any examination, filed the map of the general route and of definite location—fixing the eastern terminus of said road at the mouth of Montreal River, and the Commissioner of the General Land Office, at the same time withdrew the land co-terminus to said road, and such withdrawal included the place as well as the indemnity lands.

With the company's eastern terminus established—the line of its route ran westerly to the Columbia River in the then territory of Washington.

By Section 10 of the Act of July 2, 1864, the Northern Pacific Railroad Company was prohibited from issuing any mortgage or construction bonds or lien made in any way except by the consent of the Congress of the United States. The Company, however, on May 31, 1870, prevailed upon Congress to give its assent to the sales of its bonds to aid in the construction of its railroad, with authority to secure the payment of the same by a mortgage on its prospective property; at the date of this joint Resolution the Northern Pacific Railroad Company had not filed its map of general route or definite location, it was not the owner of any lands. It had not at that time commenced the construction of its road.

However, under the authority of this joint Resolution, the Northern Pacific Railroad Company gave a

mortgage dated July 1, 1870, covering the entire grant from Lake Superior toPuget Sound, to secure the payment of construction bonds to not exceed $50,000 per mile of road, the legal and equitable title to this land was at that time in the United States. This mortgage was given by the railroad company to Jay Cooke and J. Edgar Thompson, whe were named the trustees.

The length of the road was estimated in the mortgage at 2600 miles. From the money raised as the result of this mortgage the Northern Pacific Railroad Company commenced the construction of its road in 1871, at Thomson's Junction, about 20 miles west of Duluth and continued westerly from that point to the Missouri River. On January 1, 1874, the said Northern Pacific Railroad Company was placed in the hands of a receiver. From an examination of its affairs it was found that said company had disposed of $84,000,000. of its stock, had issued bonds in the sum of $30,735,600., and had received for the sale of lands bonds to the amount of $15,000,000., making a total at its face value of $129,735,600. The construction of this road should be credited with 400 miles of constructed railroad, and by reason of such construction with the title to 8,115,198 acres of land.

The line of the road as definitely fixed passed through the States of Wisconsin, Minnesota and Oregon, and through the territories of Dakota, Montana, Idaho and Washington. If we included the indemnity limits attached to said grant, the land embraced therein would be every alernate section designated by odd numbers for 80 miles in a state, and 120 miles in a territory. The land granted to this company within its place limits would be about 50,000,000 acres of the public domain, equal to about 78,000 square miles of land, which would equal the land within the boundaries of the States of Maine, New

Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey and Maryland. If the indemnity limits were added to the granted land, the area would equal the lands within the boundaries of the States of New York, Pennsylvania and Maryland. This enormous quantity of land has been withdrawn from settlement or disposal since August 17, 1870, or 39 years. The land department whose duty it is to protect the interest of the people of the United States in all matters pertaining to the public domain, supinely assented to this assumption of title. The Northern Pacific Railroad Company was supreme within the halls of Congress. Its opinion as to its rights, apparently dominated every branch of the land department. The company has never had any use for the charter of its creation as defining its powers, but assumed although brought into its existence by the Act of July 2, 1864, that it could do as it pleased.

The surface of the ground from Thomson Junction to the Missouri River, is nearly a dead level plain, nature seems to have graded the whole distance. There was no heavy grading to be done, no deep cuts to be made, no expensive filling, no large expense in bridging, no right-of-way to be bought. There were no grounds for station-houses, water tanks or other structures, to be purchased; no stone, timber or ties to be paid for; all these things were made a free gift from the government. Taking into consideration these facts—this railroad could have been easily constructed for $1500.00 per mile. If so, this 400 miles of constructed road should not have exceeded six million dollars. If we take the face value of the stock and bonds that were sold, together with the amount received from the sale of land, the aggregate would amount to $129,136,600.

THE RE-ORGANIZATION.

The plan of reorganization of the financial affairs of the Northern Pacific Railroad Company was subsequently proposed and adopted. By such plan, the capital stock of One Hundred Million Shares was to remain as fixed in the Act of July 2, 1864, and the stock was to be divided into Preferred and Common Stock. The amount of Preferred Stock was fixed at Fifty-one Million Shares, and the amount of Common Stock at Forty-nine Million Shares. The proposed plan was to use the amount received for the Preferred Stock to take up the $30,735,600 in bonds, and for every $1,000 of these outstanding bonds it proposed to give to the holders of the same, Preferred Stock to the amount of $1,400.00, this would take Forty-three million shares of Preferred Stock to purchase the $30,730,600 in bonds. The remainder of the Preferred Stock was to be used to retire outstanding land warrants, also bonds that had been issued in payment of the floating debt of the company, and for the purpose of carrying into effect the plan of re-organization. There was no authority in the charter of the Northern Pacific Railroad Company authorizing the dividing of its stock into preferred and common, or to give any portion of its stock a preference over any other part thereof. Under this plan of re-organiaztion, the preferred stockholders had the right to vote, the common stockholders had not. The preferred stockholders were entitled to dividends in each calendar year not exceeding eight per cent per annum on the net returns of the road before any dividends could be paid on the common stock. By this plan it was also agreed that the preferred stock might be convertible at par into land belonging to the company east of the Missouri River in the State of Minnesota, and the Territory of Dakota. The Common Stock was to have no voice in the management of the affairs of the company, and was

to receive no dividends on such stock until there was a surplus after dividends were paid on the preferred stock. By the consummation of this plan of re-organization the financial affairs of the Northern Pacific Railroad were wholly rearranged. Substantially all of its indebtedness existing at the time of the adoption of the plan were paid. Its capital stock outstanding at that time was surrendered, and the preferred and common stock provided for. It was an adjustment of its financial affairs under and within the original act of incorporation, and without the sanction of any additional lagislation by Congress. The preferred stockholders were placed in control of the affairs of the company, which together with the subsequent bond holders, have since managed to shape the policy of the Railroad Company.

Whilst it is true that Attorney General Harmon in 1897 rendered to the Secretary of the Interior an opinion favorable to the Wisconsin Company upon the subject of the Northern Pacific land grant, and whilst it is the fact that another opinion upon the same subject to the same department and of like import, was rendered by Attorney General Moody in 1905, neither of the opinions, as I shall endeavor to show, meets the real question involved here.

To follow this matter understandingly, it should be bourne in mind that three separate and distinct organizations have had to do with the Northern Pacific Estate:

First.—The Northern Pacific Railroad Company, the corporation which Congress created by an Act approved July 2, 1864, and which may be called the "Federal

Second.—A voluntary association of bondholders organized September 29, 1875, in New York City, under the same name (The Northern Pacific Railroad Company), which may be termed the "Organization of 1875."

Third.--The present Wisconsin corporation, chartered under the name of the Superior & St. Croix Railroad Company, now called the Northern Pacific Railroad Company, which may be termed the "Wisconsin Company."

In the Congressional incorporating Act of July 2, 1864, (Statutes-at-Large, 365), in and by Section 10, it was expressly stipulated that no mortgage or construction bonds should ever be issued by the Northern Pacific Railroad Company on its railroad, and that no mortgage or lien should be made by it in any way excepting by the consent of Congress.

In 1866 the control of this Federal company passed to J. Gregory Smith, of Vermont, and his associates. In 1867 Mr. Smith entered into two certain agreements with various other persons. Copies of which are as follows:

WHEREAS, A charter has been granted by the Congress of the United States for a railroad and telegraph line from some point on Lake Superior, in Minnesotaor Wisconsin, to Puget Sound, with the right to construct a branch to Portland, Oregon, under the name of the Northern Pacific Railroad Company, and granting lands to aid in the construction of said road and telegraph, to the amount of ten sections per mile on each side of said road in the States, and of twenty section per mile on each side in the Territories, which said grant of land amounts by estimate to nearly forty-seven millions of acres; and

WHEREAS, The control of said charter and franchise is now in the hands of J. Gregory Smith, of St. Albans, Vermont, and his associates, and whereas said Smith and his associates have paid for the procurement of the charter and other expenses the sum of one hundred and two thousand ($102,000), in cash, exclusive of any

compensation for himself or his associates, and have issued the certificates of indebtedness of the company, bearing interest from March, 1866, for one hundred thousand dollars additional, and have agreed to recognize the stock of the company, issued by the Josiah Perhem, late president of the company, to the amount of $600,000; and

WHEREAS, it is proposed, for the purpose of providing for the early commencement and prosecution of the work of construction of said road and telegraph, to effect an efficient organization of said company, and to procure from Congress additional aid therefor by way of subsidy and such other legislation as may be necessary in the premises; and

WHEREAS, It is proposed, for the purpose of more convenient organization, to divide the said enterprise into twelve shares, to be valued at the rate of $8,500 per shares, now, therefore, for the purpose above set forth, this agreement made and concluded this tenth day of January, A. D. 1867, by and between J. Gregory Smith, of St. Albans, Vermont, acting for himself and associates of the first part, and such persons as may hereafter become subscribers to this agreement, parties of the second part.

WITNESSETH, FIRST:—That each subscriber hereto, party of the second part, shall pay on demand to said Smith, the sum of eighty-five hundred dollars for each one-twelfth part or share in said enterprise, and in

that proportion for any lesser part so by himself subscribed for, and upon payment of said amount, each subscriber aforesaid, shall, and he does hereby become jointly interested with said Smith and his asociates according to the number of shares or parts of shares so subscribed for by him, in the charter and franchise of the Northern Pacific Railroad, with all its right, powers, privileges and immunities.

SECOND:—It is mutually agreed by and between the parties, that the best efforts of each and all shall be given to obtain from Congress the passage of a bill granting aid to the said company for the construction of said road and telegraph, and for such further legislation as may be needed and that each party shall contribute, acording to the interest which he holds, the necessary funds for that purpose, said moneys and expenses to be paid and incurred under the direction of a committee to be appointed for that purpose.

THIRD:—It is further agreed that each share in the enterprise shall be entitled to one director in the company, to be elected at the next annual election of the board, and that in the meantime the vacancies that can now be obtained by the resignation of present members, may be filled by such parties from among the subscribers hereto as may be by them designated.

FOURTH:—That as soon as the necessary legislation from Congress con be obtained, a meeting of the subscribers shall be held at an early day, to make such further organization as may be advisable, with a view to the commencement of the work of construction of said road, and securing the lands granted by the charter.

FIFTH:—Each party hereto may subdivide his interest according to his own choice, the subdivision and addition of new parties, however, not to change the mode and manner of representation in the management as set forth above.

(Stamp)

W. B. Ogden,	1-12 and 1-3 of 1-12.	
Robt. H. Burdell,		1-12
Pres. Erie R. R.		
W. G. Fargo,	)	
D. N. Barney,	)	
B. P. Cheney,	)	
A. H. Barney,	)	2-12
Edward Reilly,		1-12
G. W. Cass,		1-12
J. Edgar Thompson,		1-12

WHEREAS, In a certain agreement of date January 10, 1867, made and executed by J. Gregory Smith, acting for himself and asociates, representing the charter and franchises of the Northern Pacific Railroad Company of the first part and such persons as should become subscribers to said agreement and the conditions thereof, of the second part, the following paragraph is made part of said agreement, to-wit:—

SECOND: It is mutually agreed by and between the parties that the best efforts of each and all shall be given to obtain from Congress the passage of a bill granting aid to the said company for the construction of said road and telegraph, and for such further legislation as may be needed; and that each party shall contribute according to the interest which he holds, the necessary funds for that purpose, said money and expenses to be paid and incurred under the direction of a committee to

be appointed for that purpose; now, therefore, it is further agreed and hereby made a part of said agreement, to which this supplement is to be annexed, that the provisions in said paragrph contained shall be, and are hereby so limited and modified that not over $12,500 shall be assessed or called in on any twelfth part mentioned in said agreement, including in said $12,500, all payments that may have already been made on account of any such twelfth part, without the unanimous consent of those representing the 12 parts named in said agreement.

New York, July 3, 1867.
J. Gregory Smith, for self and asociates, 4 & 2-3 twelfths
W. B. Ogden, 1 and 1-3 twelfths
Robert H. Burdell, Pres't. 1 twelfth.
D. N. Barney,)
B. P. Cheney,) 1 twelfth
A. H. Barney,)
W. G. Fargo,) 1 twelfth
by A.H.Barney,)
Geo. W. Cass, 1 twelfth
J. Edgar Thompson, for self and associates, 1 twelfth
Edward Reilly, 1 twelfth

Under these writings there was established a partnership, the parties thereto undertaking to become jointly interested "in the charter and franchises of the Northern Pacific Railroad with all its rights, powers, privileges and immunities." They claimed to own the "enterprise," which they divided into twelve shares. Subsequently, under terms of two contracts made in 1869 and in 1870 with Jay Cook & Co., Bankers, these twelve interests or shares were increased to twenty-four.

The parties claiming under these various contracts having the control of the original stock of the Federal

Corporation of 1864, called themselves "proprietors" of the Northern Pacific Railroad and also "owners" of the "original interests" therein.

By a joint resolution of March 1, 1869, Congress gave consent to the Northern Pacific Railroad Company issuing its bonds and securing the same by a mortgage upon its railroad ad its telegraph line. This did not seem to cover the land grant and by subsequent resolution of May 31, 1870 (16 Statuates-at-Large, 378), Congress again gave authority to the company to issue its bonds to aid in the construction and equipment of its road and authorized it to secure the same "by mortgage on its property and rights of property of all kinds and description, real, personal and mixed, including its franchises as a corporation."

The resolution of 1870 contained this provision:

> "Provided that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this Act authorized, at the expiration of five years after the completion of the entire road, SHALL BE SUBJECT TO SETTLEMENT AND PREEMPTION LIKE OTHER LANDS at a price to be paid to said company not exceeding two dollars and fifty cents per acre," and it stipulated that in the event of the foreclosure of the mortgage the lands should be sold in single sections or sub-divisions and at public sale AT THE PLACES WHERE SITUATE.

Under this resolution the Northern Pacific Railroad Company on July 1, 1870, executed its authorized mortgage to Jay Cooke and J. Edgar Thompson, as mortgage trustees, providing for an issue of bonds at a rate not to exceed fifty thousand dollars per mile of road. After the company had constructed five hundred

and twenty-nine (529) miles of railroad (four hundred and twenty-four (424) miles in Minnesota and Dakota, and one hundred and five (105) miles in the-then Territory of Washington), it defaulted in the payment of interest on the bonds issued under this mortgage, and in April, 1875, proceedings for the foreclosure of the mortgage were begun in the United States Circuit Court for the Southern District of New York. Under those proceedings a judicial sale was had IN THE CITY OF NEW YORK in August, 1875, under which all the property of the Federal corporation was sold to a committee of bondholders acting under a plan of re-organization.

After this sale the purchasing bondholders, on September 29, 1875, met and organized in the City of New York. They announced that by virtue of said sale and their purchase thereunder "we became the body politic and corporate known as the Northern Pacific Railroad Company and in that name, we and our associates will be clothed with all the powers, rights, liberties, franchises, etc., of said corporation."

REPORT

Made By

THE PURCHASING COMMITTEE

September 29, 1875.

FIRST MEETING OF PREFERRED STOCKHOLDERS AND REPORT OF PURCHASING COMMITTEE,

September 29th, 1875.

Meeting of the Preferred Stockholders of the Northern Pacific Railroad Company, held pursuant to advertised notice, on the 29th day of September, 1875.

(ABSTRACT FROM THE RECORDS)

There were present at this meeting, Messrs. Johnston Livingston, Frederick Billings, George Stark, James K. Moorehead, John N. Hutchinson, and John M. Denison, the Committee appointed by the Bondholders of the Northern Pacific Railroad Company, to purchase the same and all its property and franchises, under the "Plan" adopted June 30th, 1875, and others associated with them as such Preferred Stockholders, by having as Bondholders, assented to and complied with the Plan.

Mr. Johnston Livingston called the meeting to order.

Mr. Joseph Dilworth, of Pittsburg, Penn., was elected Chairman of the meeting.

Mr. D. E. Small, of York, Penn., was elected Secretary.

The Secretary read the call for the meeting in the following words:

TO THE BONDHOLDERS OF THE NORTHERN PACIFIC RAILROAD COMPANY:

On the 12th instant, the undersigned, your Committee, purchased at judicial sale under the decree of the Circuit Court of the United States for the Southern District of New York, all the property of the Northern Pacific Railroad Company (except the patented and the certified lands), together with all its rights, liberties and franchises, including the franchise to be a corporation, as described in the decree; which sale was, on the 25th day of August instant, confirmed by the Court.

Upon the execution and delivery to us of the deeds of the property and franchises so purchased, under said sale and confirmation, we became the body politic and corporate known as the Northern Pacific Railroad Company, and in that name we and our associates will be

clothed with all the powers, rights, liberties and franchises of said corporation, including the franchise to be a corporation.

Now, in order to accomplish the purpose of our appointment and of the "plan" adopted by the Bondholders on the 30th day of June, 1875, you, who have, or then shall have, surrendered your bonds in payment for Preferred Stock, are hereby notified to meet, in person or by proxy, at the office of the Company, No. 23 Fifth Avenue, in the City of New York, on Wednesday, the 29th day of September, 1875, at 12 o'clock noon, to elect a Board of Directors to serve for such time as the by-laws you may then approve shall provide; and to transact any other appropriate business.

Holders of receipts of the Farmers' Loan and Trust Company of New York, for surrendered bonds, will, on production of such receipts, be entitled to vote in person or by proxy at said meeting, and until formal certificates of preferred stock are issued.

Holders of common stock have not the right to vote until on and after July 1st, 1878.

Signed by the Committee, and attested by the Secretary of the N. P. R. R.

New York, No. 23 Fifth Avenue,

August 27th, 1875.

The Secretary then read an affidavit that the above call had been duly published.

Mr. Stark presented and read the following Report of the Purchasing Committee to the Stockholders:

TO THE STOCKHOLDERS OF THE NORTHERN PACIFIC RAILROAD COMPANY:

The undersigned, a Committee chosen by the Bondholders of the Company at their general meeting, held in

the city of New York, on the 30th day of Jun last, "to attend the sale of the railroad and other property of the Company, with a view to purchase the same, and take title therefor, for the benefit of all the parties assenting to, and complying with the conditions of the plan of reorganization; to assume the management of the railroad and property when they shall have acquired title thereto; to attend to the issuing of bonds and stocks, perfecting title, and generally to do all things necessary for the complete execution of the plan, and to place the railroad and property again under the control and management of a Board of Directors, to be elected hereafter by the Preferred Stockholders," having attended to the duties assigned to them, beg leave to report their proceedings to date.

The foreclosure of your Mortgage was initiated on the 16th of April last, in the United States Circuit Court, and a Receiver was thereupon appointed; and in conformity to subsequent decrees of the Court, "all the property of the Northern Pacific Railroad Company (except the patented and certified lands) together with all its rights, liberties and franchises, including the franchise to be a corporation," was put up at auction, on the 12th day of August last, and was purchased by us for the sum of one hundred thousand dollars, and on the 25th day of August last, the sale was confirmed by the Court. The preparation of the deeds of the property and franchises so purchased, and the papers incident thereto, under such sale and confirmation, has been attended to with great care, under the advice of experienced counsel, and their final execution has been delayed until now. We have this morning come into full possession of the property purchased on your behalf, and we propose to immediately place it under the control and management of the Directors you are assembled to elect.

The patented and certified lands of the Company remaining unsold, amount to about six hundred thousand acres, all in Minnesota and Dakota. Their sale is postponed to such future day as the Court may hereafter order. The decree for their sale provides that five per cent of their purchase money shall be paid in cash, and the balance may be paid in the First Mortgage Bonds of this Company. To enable us to act efficiently in your behalf when such sale shall occur, and for the purpose of securing to the Bondholders in general the full benefit of the entire property of the Company under the foreclosure, the Committee, acting under the advice of counsel, has caused the surrendered Bonds to remain in the hands of the Farmers' Loan and Trust Company, subject to the control of the Committee, for such further use as the interests of the Bondholders may demand.

In compliance with our "Call," issued on the 12th of August last, bonds have been deposited with the Farmers' Loan and Trust Company for exchange into Preferred Stock, and for otherwise carrying on the objects of the Plan of re-organization, amounting to this date, to about twenty millions of dollars. Large daily additions are being made, and we have assured reason to expect, that nearly all will eventually come in. No time has yet been fixed limiting their reception. The Committee feel inclined to make the time ample for all reasonable emergencies, but would advise holders to send in their Bonds at the earliest practicable time.

The Powers of Attorney received by, and authorizing the Committee to carry out the "Plan" of re-organization, foot up about twenty-six millions of dollars, or more than five-sixths of the whole, and large additions are being made daily. Without doubt, the balance will come forward, as little or no cash dividend can be expected by any who may stand out.

In transferring the Railroad properties acquired, to the management of your Directors, we take occasion to congratulate you upon the rapid success with which we have been enabled to carry out thus far the purposes of our appointment, and to thank you for the confidence you have shown in us by promptly responding to our calls for your Powers of Attorney and the surrender of your Bonds. It augures well for the ultimate success of your magnificent enterprise, that your confidence and unanimty have enabled a mortgage of thirty millions to be substantially foreclosed, and a re-organization completed, in less than six months from the initiatory step, without any of the usual attendant and consequent litigation.

You have now 550 miles of road in paying operation, substantially free from debt, and an attaching domain of nearly ten million acres of land. With this immense extent of unencumbered property as a basis for future operations, and the twenty-five thousand and odd acres to be added for every mile of new road built, there ought to be little doubt of your ability to secure means for the early resumption of work in the extension and completion of the Road.

New York, September 29th, 1875.

Signed by the Committee.

On motion of Mr. Lewis, the report of the Purchasing Committee was accepted and ordered to be placed on the minutes of the meeting.

A body of By-Laws which had been adopted by the Purchasing Committee, for the government of the Northern Pacific Railroad Company, was presented and read to the meeting.

On motion of Mr. Tower, it was resolved that the meeting approve the action of the Purchasing Committee in adopting the By-Laws.

On motion of Mr. Thaw, Francis, Jordan, of Harrisburg, Penn., James B. Williams, of Stanford, Conn., and Joseph D. Potts, of Pittsburg, Penn., were chosen inspectors of the election for Directors this day to be held.

The polls were ordered to be kept open for three hours.

A recess was ordered, to enable the Inspectors to assort and count the ballots.

Sept. 30, 1875, 10 o'clock A. M.

The recess having expired, the stockholders reassembled in meeting.

The Inspectors of election reported—that the voting at said election was by ballot, one vote for each share of said Preferred Stock, that the whole number of votes cast by said Preferred Stockholders, was one hundred and eleven thousand two hundred and fifty-two, and that the following named gentlemen, stockholders in the Corporation and duly qualified, were elected Directors of the Northern Pacific Railroad Company, viz:

EDWIN M. LEWIS, GEORGE W. CASS
JOHNSTON LIVINGSTON, CHAS B. WRIGHT,
J. K. MOOREHEAD, JOSEPH DILWORTH,
JOHN N. HUTCHINSON, B. P. CHENEY,
GEORGE STARK, CHARLEMAGNE TOWER,
JOHN M. DENISON, FREDERICK BILLINGS,
J. FRAILEY SMITH.

The report of the Inspectors was accepted and adopted, the Directors were duly notified of their election, and the meeting adjourned sine die.

The purchasers thus claimed to have acquired at foreclosure sale the prerogative TO BE a corporation.

At the time, however, even in the minds of those making the claim, there was doubt sufficient to prompt them to ask for Congressional ratification. Early in 1878 a bill was introduced in Congress to secure to this re-organized company confirmation of title to the property and to all the corporate powers and franchises, "including the franchise to be a corporation," originally conferred upon the Northern Pacific Railroad Company by its Federal charter of 1864.

That bill failed of passage. It was never again introduced. A record of the proceeding will be found in the Congressional Record of the 45th Congress, Volume 7, part 3, pages 2690, etc.

Subsequently, the Supreme Court of the United States, in an opinion delivered in 1884, in the case of Memphis & Little Rock R. R. Co. v. the Railroad Commissioners, 112 U. S., 609, made it clear that such claim of the purchasing bondholders was erroneous. The Court there held that "The franchise TO BE a corporation," is wholly distinct from "a franchise as a corporation to maintain and operate a railway," that the franchise TO BE a corporation is not a subject of sale and transfer unless made so by Statute WHICH PROVIDES A MODE FOR EXERCISING IT, and further that A MORTGAGE OF THE "CHARTER" OF A CORPORATION MADE IN THE EXERCISE OF THE POWER GIVEN BY STATUTE CONFERS NO RIGHT UPON PURCHASERS AT A FORECLOSURE SALE TO EXIST AS THE SAME CORPORATION! The Court said, INTER ALIA, "The franchise of being a corporation belongs to the corporators, while the powers and privileges vested in and to be exercised by the corporate body as such, are the franchises of the corporation. THE LATTER HAS NO POWER TO DISPOSE OF THE FRANCHISE OF ITS MEMBERS

which may survive in the mere fact of corporate existence after the corporation has parted with all its property and all its franchises.

In no event could the purchasing bondholders of 1875 thus acquire by foreclosure sale the prerogative franchise "to be the Federal corporation." Moreover, the United States Circuit Court for the New York district was wholly without jurisdiction in the proceedings of 1875. The proceedings were IN REM. They were for the foreclosure of a mortgage—for the enforcement of a lien upon a railroad and lands, no part of which were situate within the territorial jurisdiction of the Court. A sale was prayed for. The record itself discloses that no part of the RES was within the jurisdiction of the Court. In the Western States and Territories in which the railroad and lands were located, a mortgage has always been held as not conveying any estate or title to the mortgagee, but as simply creating a lien. Where a mortgage is considered as merely creating a lien, an action to foreclose it is always a LOCAL action, inasmuch as the decree operates upon the title. It is elementary that a Court in one State is without jurisdiction to decree a lien upon lands or land interests in another State or to enforce such lien by a sale under its decree.

In actions purely PERSONAL, consent may at times give jurisdiction, but IN REM consent can never confer upon a court jurisdiction over the RES—over lands or land interests, if such RES be not actually within its jurisdiction.

The judgment of the United States Circuit Court in 1875 was therefore utterly void, and the sale thereunder transmitted no title to either the property or to the franchise to be a corporation. Whether the sale operated

as an equitable assignment of the mortgage is a question not necessary to now discuss. The purchasers of 1875, however, did acquire all the bonds and all the obligations of the original Federal Company from the creditors and they acquired from the stockholders, the so-called "Proprietors" and holders of "Original Interests," all such original stock of the Federal corporation as had been issued. THOSE SHARES OF STOCK AND THOSE OBLIGATIONS IT HELD AS ITS MUNIMENTS OF TITLE TO THE PROPERTY.

The proceedings of 1875 did not result in a disolution of the Federal corporation, but did result in the formation of a new organization, a voluntary body, an organization of bondholders, calling themselves by the original ttitle—"Northern Pacific Railroad Company."

This bondholders' organization of 1875 was NOT a Federal corporation, for two corporations could not co-exist under the Congressional Charter Act. There was no general Federal legislation under which it could claim corporate existence. It was, therefore, neither DE JURE NOR DE FACTO a Federal corporation, and it never claimed to be a State corporation. What then was it? What could it be other than a partnership association or a joint stock company?

We have, then, at this stage, two organizations, one the Federal Corporation of 1864, and the other the organization of 1875, WHICH WAS NOT A FEDERAL CORPORATION.

At this point I direct attention to the fallacy in the opinion of Attorney General Harmon, reported in Volume 21 of the Opinions of Attorney General at page 486. THAT OFFICIAL COMPLETELY OVERLOOKED

THE REORGANIZATION OF 1875, AND ERRONEOUSLY ASSUMED THAT THE LAST REORGANIZATION OF 1896 WAS UNDER A FORECLOSURE OF MORTGAGE EXECUTED BY THE FEDERAL CORPORATION OF 1864. The Court proceedings of 1896 were based, NOT upon mortgages or obligations created by the Federal Corporation of 1864, but WERE UPON MORTGAGES AND OBLIGATIONS CREATED BY THE ORGANIZATION OF 1875.

The organization of 1875 owned all the stock and obligations of the Federal Corporation of 1864, BUT IT WAS NOT THE FEDERAL CORPORATION, and it had no authority to mortgage the property itself for two reasons: First, because Congress had not consented to such mortgaging; Second, because the title to the property itself was in the Federal Corporation of 1864, no valid judicial sale having divested the Federal Corporation of the title. When, therefore, the judicial proceedings in this last reorganization of 1896 were pending, a plea was filed on behalf of the Wisconsin Central Company, a creditor, alleging that the mortgages sought to be foreclosed were invalid, because Congress had not sanctioned their execution, and averring that the only mortgage Congress had ever authorized was one which had been foreclosed and discharged in 1875.

THE ISSUE RAISED BY THIS PLEA WAS NEVER DISPOSED OF BY THE COURT, AND IT REMAINS UNDISPOSED OF TO THIS DAY. In the decree of sale the Court expressly provided that the issue raised by the plea of the Wisconsin Central Company as to the validity of the mortgages should be reserved and that the purchaser should buy subject to such reservation. It was anomalous to decree a foreclosure and sale, and at the same time to reserve for determination a question vital to the foreclosure itself.

Those in charge of the reorganization of 1896 knew of all these facts. They knew that the organization of 1875 was not a Federal corporation and they knew that unless it was a Federal corporation the United States Circuit Court in Wisconsin, in which the proceedings were being had, WAS WITHOUT JURISDICTION OF THE CAUSE. Knowing these things they realized that it would not be safe and that it would not do to depend upon the foreclosure sales to effect this last reorganization. What then did they do? They formulated a plan of reorganization with J. P. Morgan and Company as reorganization managers, calling for deposits of the stocks and bonds of the organization of 1875, termed "The Northern Pacific Railroad Company." It was provided by this reorganization agreement that each depositing bondholder or stockholder "sold and assigned" his bonds and stock to the reorganization managers who were expressly vested with all the rights and powers of owners in respect to the same. None of the stockholders but those who "sold" and "assigned" to Morgan and Company, reorganization managers, were to be permitted to "buy" new stock from the managers for syndicate account.

At page eight (8) of this reorganization plan and agreement it is said, "At the discretion of the managers, the various properties will be sold under one or more of the several mortgages in default OR OTHERWISE DEALT WITH. The property was "otherwise dealt with." The compensation of the managers was to be based "upon the par value of the securities deposited under the plan and of the new securities issued IN EXCHANGE thereof." It was an "exchange of securities" that was provided for. In paragraph fifth of the reorganization agreement the managers were authorized to proceed WITH OR WITHOUT FORECLOSURE,

and it is therein stipulated that all the provisions of the plan and agreement "shall equally apply to and in respect of any PHYSICAL PROPERTIES embraced under the reorganization and to and in respect of any SECURITIES representing any such properties, IT BEING INTENDED THAT FOR ALL PURPOSES THEREUNDER ANY SUCH PROPERTY AND ANY SECURITY REPRESENTING SUCH PROPERTY MAY BE TREATED OR ACCEPTD BY THE MANAGERS AS SUBSTANTIALLY IDENTICAL." The "securities" were to be deemed and treated as identical with the "property" or estate itself, and were so treated.

Contemporaneously with the announcement of the reorganization plan there was made and entered into by the reorganization managers a syndicate agreement with THEMSELVES as syndicate managers and with THEMSELVES and others as SYNDICATE SUBSCRIBERS purporting to sell one hundred and five millions two hundred and fifteen thousand seven hundred and five dollars ($105,215,705) par value of new stock and bonds for nineteen millions eight hundred and thirty dollars ($19,873,830). Seventy seven millions five hundred thousand dollars $(77,500,000) of such new securities were in the shape of common stock, and exactly ONE-THIRD OF THIS WHOLE AMOUNT, or twenty-five millions eight hundred and thirty four thousand dollars (25,834,000) par, went to James J. Hill and his associates of the Great Northern Railroad for four millions one hundred thousand dollars ($4,100,000) as was pointed out by Attorney General Knox in the Northern Security case.

The so-called "judicial sales" of 1896, under which the Wisconsin Company became a purchaser, took place on July 25, 1896, and on subsequent dates. TWELVE

DAYS PRIOR TO THE JUDICIAL SALES, to-wit: On July 13th, 1896, the Wisconsin Company entered into an agreement with J. P. Morgan and Company, re-organization managers, for the purchase of the stocks, bonds and securities deposited with or acquired by them, and for the acquisition of the Northern Pacific Estate, FIXING THE VALUE OF THAT ESTATE AT THREE HUNDRED AND FORTY-FIVE MILLIONS OF DOLLARS ($345,000,000). A copy of said agreement is now produced:

THIS AGREEMENT, Made the 13th day of July, eighteen hundred and ninety-six, by and between Northern Pacific Railway Company, a corporation organized and existing under the laws of the State of Wisconsin (hereinafter called the "Company") party of the first part; and J. P. Morgan & Co., a co-partnership, of the City of New York (hereinafter called the "Re-organization Managers"), party of the second part, WITNESSETH AS FOLLOWS:

WHEREAS, The Re-organization Managers have been engaged and are now engaged in carrying out a plan of reorganization of the Northern Pacific Railroad system, pursuant to a certain plan and agreement dated March 16, 1896, of which a copy is hereto annexed, marked "Schedule A," reference thereto being made as though the same were herein fully set forth:

AND WHEREAS, The Company composed exclusively of citizens of and residents in the United States of America, has been duly organized and is in existence by and under the laws of the State of Wisconsin, and has complied with all the provisions of law so as to enable it to transact business as a railroad company in the several States of Wisconsin, Minnesota, North Dakota, Montana,

Idaho, Washington and Oregon, and it is intended that as such railroad corporation, it shall acquire the railroad, property and franchises, including the land grant of the Northern Pacific Railroad Company, in each and all of said several States, by becoming the purchaser thereof at the foreclosure sales to be had in pursuance of the several decrees of foreclosure and sale entered by the Circuit Court of the United States for the Eastern District of Wisconsin on April 27, and April 28, 1896, in a certain consolidated cause in equity, pending in said Court, wherein The Farmers' Loan and Trust Company is complainant and the Northern Pacific Railroad Company and others are defendants, and certain decrees and orders ancillary thereto entered in causes pending between said parties in the Circuit Courts of the United States for the several other districts of the States above mentioned.

AND WHEREAS, In pursuance of the provisions of said plan and agreement dated March 16, 1896, the Re-organization Managers have acquired, and expect from time to time hereafter to acquire, the title to the property, franchises, stocks or bonds of all or most of the several corporations mentioned in said plan and agreement, and desire to vest the ownership thereof in the company for and as the new Railroad Company, successor to the Northern Pacific Railroad Company, contemplated in the said plan and agreement;

AND WHEREAS, The right, title and interest in the bonds, stocks, property or franchises of the Northern Pacific Railroad Company, and the several subordinate corporations mentioned in said plan and agreement, heretofore vested in the Re-organization Managers, are by the mutual agreement of the parties hereto of the full

value of $345,000,000 payable in the fully paid and non-assessable stock, and of the prior lien and general lien bonds of the Company, to be executed and delivered as hereinafter provided, to-wit:

(a) Preferred Stock $75,000,000
(b) Common Stock 80,000,000
(c) Prior Lien Bonds.....130,000,000
(d) General Lien Bonds 60,000,000

the amount of such bonds (either prior lien or general lien) to be received hereunder being subject to resrvation and diminution as from time to time hereafter shall be determined by mutual agreement of the parties to be necessary to provide for the acquisition or retirement of outstanding bonds of the Northern Pacific Railroad Company or of any division thereof, or of any subordinate or constitutent company, or for the provision for betterments or for any other object within the scope and purpose of the said plan and agreement, as finally carried out.

NOW, THEREFORE, In pursuance of such plan and agreement hereunto annexed and in consideration of the premises and of the mutual promises and agreements hereinafter contained the said parties do hereby promise and agree as follows, to-wit:

First: The Company will forthwith issue and deliver to the Re-organization Managers, or upon their order, certificates for 750,000 shares of its fully paid and non-assessable preferred stock and 800,000 shares of its fully paid and non-assessable common stock of the character described in such plan of re-organization.

Second: The Company will forthwith make and execute, and cause to be recorded, its mortgage securing

an issue of $130,000,000 of its prior lien bonds and $190,000,000 of its general lien bonds; and will make and execute, and cause to be certified and delivered, to the Re-organization Managers such prior lien bonds, and such general lien bonds, subject to diminution or reservation as hereinbefore stated, all of the character described in such plan of re-organization.

Third: The Company from time to time hereafter will make and perform any agreements which the Re-organization Managers may require, and will adopt and will perform any and all agreements which may have been made or which may be made by the Re-organization Managers with respect to the issue of the securities of the company, as provided in said plan and agreement. The Company, upon demand of the Re-organization Managers, will assume and satisfy all obligations and liabilities of the Re-organization Managers in connection with such sale and purchase of the property of the Northern Pacific Railroad Company, or with the re-organization under said plan and agreement, or any modification thereof, or with the acquisition of stocks or bonds necessary or desirable to acquire in connection with, or as part of, such re-organization.

Fourth: The Company, upon the request of the Re-organization Managers, will at all times and in all ways do and perform any and all acts, and execute and deliver any and all writings, suitable to carry fully into effect the said plan and agreement according to the terms and intention thereof, subject to all such modifications as from time to time may be made in pursuance of the terms thereof, including in this covenant all such purchases, consolidations, lease, contracts or other acquisitions of

rights in or in the operation of any railroad or transportation Company as from time to time may become necessary or proper in the full performance of the said plan and agreement.

Fifth: The Company, from time to time, on demand of the Re-organization Managers, will pay to the order of the Re-organization Managers all such sums as they or any of the members thereof shall have incurred or may hereafter incur for expenses in and about the performance of such agreement and plan of re-organization, and will indemnify and hold harmless the Re-organization Managers, and each member thereof, from and against all costs, expenses, liabilities and charges whatsoever incurred or which may be incurred by the Re-organization Managers, or members thereof, in carrying out such plan and agreement of re-organization, or by reason of any acts done or suffered to be done thereunder.

Sixth: The Re-organization Managers from time to time will vest or cause to be vested in the Company *the ownership of the stocks, bonds or other property representing the system formerly of the Northern Pacific Railroad Company* so far as the same shall have been acquired by the Re-organization Managaers in the performance of said plan and agreement of re-organization, and also any balance of cash received by the Re-organization Managers for the purpose of carrying out such plan and agreement, except so far as such stocks, bonds and other property may be converted or otherwise dealt with, and said cash be expended, by the Re-organization Managers in effecting any of the purposes of said plan and agreement; it being the intention of this agreement and of the parties heretofore that the Company shall become and be the suitable agency contemplated in the

said plan and agreement for the ownership and operation of the properties acquired and to be acquired pursuant to said plan and agreement, and that on the one hand all of the stock of the Company, and also its bonds to the extent above set out, shall be fully and effectually vested in said Reorganization Managers, and on the other hand the securities and properties heretofore or hereafter received under the said agreement by the Reorganization Managers shall be vested in the said Company as contemplated in said plan and agreement.

Seventh: From time to time the Company and the Reorganization Managers will, in all particulars, co-operate with each other, and will assist each other in carrying this agreement into effect, and in accomplishing the purposes of the said plan and agreement or reorganization as now existing or as from time to time modified, in pursuance of the provisions thereof; and if for any reason it shall at any time become impracticable for the Company to execute or to perform any part or provision of such plan or agreement or reorganization, then and in that case the Reorganization Managers may select any other suitable agency or method for such performance, and, upon the happening of any such contingency, the securities or property received or created by the Reorganization Managers under such modification shall be accepted by the Company in lieu and in substitution of any existing securities or property embraced within the purview of this agreement, at the value of the porperty represented by such new securities.

Eighth: This agreement is made upon the condition that the Reorganization Managers reserve unimpaired all rights and powers under said plan and agreement, that the Reorganization Managers may construe

said plan and that its construction thereof shall be conclusive, and that it may supply any defect or omission.

It is further agreed that the Reorganization Managers may from time to time in its discretion alter or modify said plan and agreement within the limits therein authorized and that in case of any such alteration or modification this agreement shall apply to the altered or modified plan and agreement in all respects as though the same were in force at the present time.

Ninth: This agreement, and each and every provision thereof, may, at any and all times, be modified, extended or enlarged by the agreement of the Reorganization Managers, on the one side and the President or First Vice President of the Company on the other.

IN WITNESS WHEREOF, The Company, by the authority of its Board of Directors, each and every of its stockholders consenting thereto has caused these presents to be executed and delivered by its President under its corporate seal, attested by its Secretary, and the Reorganization Managers have hereunto set their hands and seals the day and year first above mentioned.

Northern Pacific Railway Company,

(L. S.) By Edward D. Adams,

President.

Attest:

George H. Gardiner,
Secretary.

In Presence of

J. P. Morgan & Co.
Reorganization Managers.

The undersigned, stockholders of the Northern Pacific Railway Company, hereby assent to and approve of

the foregoing agreement.

C. H. Coster	Edward D. Adams
Francis Lynde Stetson	Charles F. Coaney
	By Edward D. Adams, Atty.
W. Paxton Little	Victor Morawitz
Mortimor F. Smith	Geo. H. Gardiner
A. H. Gillard	J. W. Almy, Jr.

This valuation was ONE HUNDRED AND FIFTY-FIVE MILLIONS OF DOLLARS ($155,000,000) IN EXCESS OF THE ENTIRE INDEBTEDNESS of the Northern Pacific Railroad on July 1, 1896, as shown by its report filed with the Secretary of the Interior and is MORE THAN SEVENTY MILLIONS OF DOLLARS ($70,000,000) IN EXCESS OF ALL THE STOCK AND ALL THE INDEBTEDNESS AND LIABILITIES WHATSOEVER of the so-called insolvent Northern Pacific Railroad Company as of July 1, 1896, as shown by said report filed in the Department of the Interior.

On the SAME DATE, JULY 13, 1896, the officers of the Wisconsin Company made oath to a statement filed with the Secretary of State of Montana with the pending resolution:

COPY OF STATEMENT

FILED IN MONTANA, JULY, 1896.

The Northern Pacific Railway Company, a corporation organized and existing under the laws of the State of Wisconsin, intending to acquire, maintain and operate railroads within the State of Montana, and to transact business in said State, complying with Section 1030 of the Civil Code of said State for 1895, hereby makes, as required by said section, the following statement:

1. The name of this corporation is Northern Pa- i ficcRailway Company, organized and existing under the laws of the State of Wisconsin; location of principal office or place of business of this corporation, without the State of Montana, is at the city of St. Paul, Ramsey County, Minnesota, and its principal office in the State of Montana will be at Helena.

2. The amount of its capital stock is one hundred fifty-five millions of dollars, divided into shares of one hundred dollars each, the aggregate of which seventy-five million dollars are preferred stock and eighty million dollars are common stock.

3. The amount of its capital stock actually paid in in money is $4,300.

4. The amount of its capital stock paid in otherwise than in cash is $154,995,700, *and the same was paid bonds and securities formerly of or belonging to the Northern Pacific Railroad Company, or of interest therein.*

5. The amount of the assets of the corporation is $4,100 in cash. *and the stocks, bonds and securities before mentioned, of or formerly belonging to the Northern Pacific Railroad Company, to an aggregate amount of which the actual cash value exceeds* $40,000,000.

6. The liabilities of such corporation are such as have been incurred for and in connection with the purchase of the property of the said Northern Pacific Railroad Company; and while not yet specifically formulated, an indebtedness equal to or not exceeding the sum of $190,000,000 has been or will be created by the said corporation, all of which will be secured by mortgages upon the property, franchises and railroads now or formerly of the Northern Pacific Railroad Company.

CITY OF NEW YORK
County of New York ss.
State of New York

In attestation of the truth of the foregoing statement, we, the undersigned, constituting a majority of the Board of Directors of the Northern Pacific Railway Company, have hereunto set our hands this 13th day of July, A. D. 1896.

EDWARD D. ADAMS, GEORGE H. GARDINER,
A. H. GILLARD, W. PAXTON LITTLE,
MORTIMER F. SMITH, J. W. ALMY, Jr.,
VICTOR MORAWITZ, FRANCIS LYNDE STETSON.

CITY OF NEW YORK
County of New York ss.
State of New York

EDWARD D. ADAMS, President, and GEORGE H. GARDINER, Secretary of the Northern Pacific Railway Company, a corporation, which makes the foregoing statement, each being first duly sworn upon his oath, says that he has read the foregoing statement, and that the same is true, and said affiants further say that the above signatures of Directors are genuine and that the signers constitute a majority of the Board of Directors of the corporation.

Subscribed and sworn to before me this 13th day of July, A. D. 1896.

EDWARD D. ADAMS,
GEORGE H. GARDINER.

In witness whereof, I have hereunto set my hand and

affixed my official seal the day and year last above written.

JOSEPH B. BRAMAN,
Commissioner of Deeds for the State of Montana in and for the State of New York resident in said city of New York.

(Commissioner's Seal.)

In that statement, made and filed PRIOR TO THE FORECLOSURE SALES, it was certified that all the stock of the Wisconsin Company—one hundred and fifty-five millions of dollars ($155,000,000)—par value had been issued, forty-three hundred dollars ($4,300) thereof for cash and that one hundred and fifty-four millions nine hundred and ninety-five thousand seven hundred dollars ($154,985,700) "was paid in BY THE SALE AND TRANSFER TO THE COMPANY OF STOCKS, BONDS AND SECURITIES FORMERLY OF OR BELONGING TO THE NORTHERN PACIFIC RAILROAD COMPANY, OR OF INTERESTS THEREIN." These securities or "interests" were certified in the statement to have a cash value exceeding forty millions of dollars.

These facts carry to mind the conviction that such "interest" in this property or estate as is held by the Wisconsin Company has been and is obtained, not by the so-called foreclosure sales, but by its acquisition of the securities of the organization of 1875, which later organization had in the first instance acquired the stocks and securities of the original Federal corporation as its basis of ownership or interest, and that the legal title to the property and estae itself remains in this Federal corporation.

In passing, I desire to call attention to the fact that the Wisconsin Company, in 1873, then called the Superior and St. Croix Railroad Company, issued, in the name of the Northern Pacific Railroad Company, thirty-eight hundred (3800) shares of its capital stock, and that, claiming to be the majority stockholders of the Wisconsin Company and claiming ownership of such thirty-eight hundred (3800) shares out of a total issue of thirty-eight hundred and forty-three (3843) shares, the Northern Pacific Railroad Company, the Federal Corporation of 1864, in the first instance, and subsequently the organization of 1875 down to the time of the last reorganization or its preliminaries, actually controlled this Wisconsin Company which now claims to have acquired the Northern Pacific Estate.

This is another of the many peculiar and remarkable facts connected with the Northern Pacific reorganization

In legislating as to the land grant, by act of July 1, 1898, (30 Statutes-at-Large, Chapter 546, pages 620 and 621), Congress was careful to refuse to recognize the Wisconsin Company as the lawful successor of the Northern Pacific Railroad Company and to expressly stipulate that such question of successorship should be left as an open one for determination when raised.

I have already pointed out the error of fact into which Attorney General Harmon fell when he over-looked the earlier reorganization of 1875.

The error in Attorney General Moody's opinion is entirely overlooking THE RIGHTS OF THE GOVERNMENT and in ignoring the fact that the Court proceedings in 1896, to which the Government was not a party, are in no way binding upon the Government.

In his opinion, addressed to the Secretary of the Interior (Vol. 25, Opinions of Attorneys-General, p. 401), Attorney General Moody uses the language in referring to the organization of 1875, whose mortgages were foreclosed in 1896:

> "It is urged that the reorganized Northern Pacific Railroad Company was not a corporation existing by virtue of an act of Congress or otherwise, the contention being that the foreclosure and sale of the franchise as a corporation of the original company did not IPSO FACTO confer corporate capacity upon the purchasers. The case of Memphis & Little Rock Railroad Company v. Commissioners (112 U. S., 609), is cited in support of this proposition. Your second question, therefore, is whether the Court was without jurisdiction of the foreclosure proceedings in 1886, and whether its decree should consequently be treated as void and of no effect, for the reason that it was not a suit arising under the laws of the United States.
>
> "After a careful examination of the reported proceedings in this connection, and of the authorities upon the subject, it seems to me REASONABLY clear that the Wisconsin Court had jurisdiction of the suit in question. In any event, Jurisdiction AFFIRMATIVELY APPEARED of record, and in view of the well settled rule with reference to collateral attack upon decrees BY THOSE WHO ARE PARTIES TO THE PROCEEDING, I have no hesitation in saying that this final adjudication of the matter cannot be treated by them as a nullity."

No one for a moment doubted the rule that parties to a proceeding cannot indulge in collateral attack upon the record of the proceeding, but IT WAS BECAUSE

THE GOVERNMENT WAS NOT A PARTY TO THE RECORD, BECAUSE IT WAS NOT A PARTY TO THE PROCEEDING AND WAS NOT BOUND BY IT IN ANY WAY; THAT GOVERNMENT OFFICIALS WERE ASKED TO INTERVENE AND TO ACT IN SECURING REDRESS FOR THE PUBLIC WRONGS INVOLVED.

In the leading case of Thompson vs. Whitman, 18 Wallace, 457, the Supreme Court of the United States expressly decided that the record of a judgment may be contradicted as to the facts necessary to give the Court jurisdiction and that if it be shown that such facts did NOT exist THE RECORD WILL BE A NULLITY NOTWITHSTANDING IT MAY RECITE THAT THEY DID EXIST. This decision has been followed again and again in both Federal and State courts. If the organization of 1875 was not a Federal corporation, THE UNTRUE AFFIRMANCE UPON THE RECORD THAT IT WAS SUCH A FEDERAL CORPORATION, DOES NOT BIND THE GOVERNMENT.

In this matter it is of public concern that it should be ascertained whether the railroad and the lands granted from the public domain are owned by a corporation created by Congress and OVER WHICH CONGRESS HAS DIRECT LEGISLATIVE POWER, or whether there has been such a transformation, through re-organization, that the legal title has passed to a State corporation free forever from the direct legislative power of Congress.

It is a matter of public concern whether the obligations imposed by Congress in connection with the property are still enforceable or whether they have been rendered unenforceable by virtue of valid foreclosure sales, as has already been set up in defence against the Government by the Wisconsin Company.

It is a matter of public concern whether the trust impressed by Congress upon the lands by the joint resolution of 1870 is of present effect. As expressly recited in the Act of 1864 the lands were donated to the Federal corporation FOR THE SPECIFIC PURPOSE OF AIDING IN THE CONSTRUCTION OF THE RAILROAD. WHEN THAT PURPOSE WAS SERVED IT WAS INTENDED THAT SETTLERS UNDER THE LAND LAWS OF THE UNITED STATES SHOULD HAVE THE BENEFIT OF THE LANDS. It was, therefore, provided in the resolution of 1870, authorizing the Jay Cooke mortgage, that all lands granted to the company not sold or disposed of or remaining subject to that mortgage should, at the expiration of five years after the completion of the entire road, "BE SUBJECT TO SETTLEMENT AND PRE-EMPTION LIKE OTHER LANDS" at a price to be paid the company, not exceeding two dollars and fifty cents per acre! Whether this provision applies to the lands in place—or to the lands within the indemnity belt referred to in the resolution of 1870, it is a matter directly concerning the Government, and it is a matter seriously affecting the interests of the people in the Western States. The mortgage referred to in the resolution was foreclosed in 1875, more than a quarter of a century ago, and the railroad itself has been completed for more than twenty years, yet the patents have been issued and continue to be issued to the Wisconsin Company, which disposes of the lands regardless of any such rights of settlement or pre-emption upon the part of the public.

Inquiry as to whether Congress still has the right to legislate directly upon the corporation in the ownership of this great trans-continental line, which was

built under the direction of Congress and with Government aid to serve national purposes, and inquiry as to whether the Federal corporation exists and continues to exercise the functions for which it was created or whether it has ceased to exercise those functions, would seem to be proper under the circumstances.

STATEMENT OF THE CASE

This controversy is in respect to the title to the South East Quarter of Section Twenty-one, Township Fifty-four, North Range Twelve, West, of the Fourth Principal Meridian, within the Duluth land district, in Minnesota. The land in controversy is within the second indemnity limits of the Northern Pacific Railroad Company, East of Duluth, and embraced within the preliminary selection of said railroad company on its list dated October 17, 1883, for the purpose of indemnifying said company for the loss of the South East Quarter of Section Nine, Township One hundred thirty-three, North-Range Thirty-four, West. The selection was made under the authority of the joint resolution dated May 31, 1870, (16 Sta. 378) entitled "A Resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes."

The land claimed to be lost, is situated on the South side of the line of the Northern Pacific Railroad Company, while the land in controversy, is north of said railroad line.

The defendants, claim title under and by virtue of a conveyance from the Northern Pacific Railway Company, the pretended successor of the Northern Pacific Railroad Company; the Secretary of the Interior, on November 7, 1905, (See Record P. 82), having approved

the selection of the Northern Pacific Railroad Company of the land in controversy made October 17, 1883, and the same was patented to the Northern Pacific Railway Company November 13, 1905. (See Record P. 89).

The title of the plaintiff rests on the following facts: On the 26th day of October, 1895, the plaintiff being over the age of 21 years, and in all respects duly qualified to enter land, desiring to avail himself of the provisions of the Act of Congress entitled, "An Act for the sale of timber lands in the States of California, Oregon, Nevada and Washington Territory," approved June 3, 1878. (20 Stat. 89) as amended by Act of August 4, 1892, (27 Stat. 348) extending the benefits of the former act to all the public land states, did on that day tender his written statement in form as required by law to the Register of th eUnited States local land office at Duluth, that being the District within which the land was situated, said statement being duly verified as the law required, with the tender of the fees for such complete filing and entry, and requested the local officers to receive and file such statement in their office, and allow him to take the necessary proceedings which would entitle him to purchase said land under the provisions of the Acts of Congress above referred to. The local officers received and filed said statement but subsequently rejected the right of said applicant to further proceed to acquire title under the provisions of said Act for the alleged reason that such application to purchase, conflicted with the Northern Pacific Railroad Company's selection made of the same land October 17, 1883, as shown of record in their office. From the rejection of this application to purchase the said Charles D. Campbell appealed to the Commissioner of the General Land Office. Subsequently and while such appeal was pending before said Commissioner and undecided,

this plaintiff, on November 9, 1896, renewed his application to purchase said land, which was again refused by the local officers for the reason of conflict with the selection of the same land by the Northern Pacific Railroad Company, but said written statement was received and filed in the local office and sent by them to the Commissioner of the General Land Office. On the 28th day of December, 1897, the said plaintiff did again renew his application to purchase said land by filing his written statement as required by law, and again the local officers refused to allow the plaintiff's application to purchase for the reason that it conflicted with the selection of the same land by the Northern Pacific Railroad Company as shown by its list filed in the Duluth land office October 17, 1883, but the local officers received said written statement and filed said application in their office, and subsequently forwarded the same to the Commissioner of the General Land Office. All of these facts appear in the record of this case on page 27, 28 and 29.

By the Act of Congress of July 2, 1864, (13 Stat. 365) under which the Northern Pacific Railroad Company was incorporated, there was granted in aid of the construction of its road (Sec. 3), " ten alternate sections of land per mile on each side of said railroad when ever it passes through a state" and it was authorized to seek indemnity in lieu of lands disposed of, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers not more than ten miles beyond the limits of the granted land. On May 31, 1870, Congress passed a joint Resolution (16 Stat. 378) a part of which is as follows:

> "In the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof,

> the amount of lands per mile granted by Congress to said Company; within the limits prescribed by its charter ,then said Company shall be entitled, *under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States,* and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency."

The land in controversy is within the second indemnity limits of the grant to the Northern Pacific Railroad Company, and it appears from what has been quoted that the selection of indemnity land was not only placed under the direction of the Secretary of the Interior, but that the railroad company were to receive from him the selection of only such land as he thought it was entitled to.

A controversy arose between the Secretary of the Interior and the Northern Pacific Railroad Company in 1894, as to the initial point or eastern terminus of the Northern Pacific Railroad. On November 13, 1885, (21 L. D. 412), the Secretary of the Interior, after consideration of the subject, determined that the initial point or Eastern terminus of said road was not further east than Superior, Wisconsin. On August 27, 1896, (23 L. D. 204) the decision of the Secretary of the Interior established the Eastern terminus of the Northern Pacific Railroad Company at Duluth, the decision was to the effect that all lands lying east of the terminus of said company's grant established at Duluth had been restored to the public domain, and were subject to entry. This would include the place as well as the indemnity lands. On July 17, 1897, (25, L. D. 48). The Commissioner of the General Land Office issued the following

directions to the Register and Receiver of the United States Land Office at Duluth, Minnesota.

"On August 27, 1896, (23 L. D. 204) the Secretary of the Interior rendered a decision wherein he held that the initial point on Lake Superior, or the Eastern terminus of the grant to the Northern Pacific Railroad Company, was at Duluth, Minnesota, and on December 24, 1896, he approved a diagram prepared by this office showing the Eastern terminal of the grant. On January 23, 1887, a copy of so much of said diagram as related to, or affected lands within your district, was transmitted to you for the use and guidance of your office. The decision of the Secretary aforesaid had the effect of restoring to the public domain all lands lying east of said terminal which has heretofore been withdrawn on account of the grant to said railroad company. Therefore, to the end that all persons interested may have opportunity to present *any claims* they may have to any of these lands, you will cause to be published for the period of thirty days in some newspaper of general circulation in their vicinity, a notice referring to said Secretary's decision which in effect declared that all lands previously withdrawn on account of the grant to the Northern Pacific Railroad Company lying east of the terminal established at Duluth, are restored to the public domain and are subject to disposal at your office. It should be specifically stated in said notice that all persons claiming rights, under the provisions of the Act of March 3, 1887, (27 Stat. 556) through purchase from the railroad company, should come forward and assert their claims at the earliest possible date in order to avoid conflict which will necessarily arise through entries made

under the general land laws, your office having no information as to the tracts likely to be claimed under said act.

The receiver, as disbursing officer, will pay the cost of the publication and forward a copy of the notice, with proof of publication as his voucher for the disbursements.

BINGER HERMANN,
Commissioner.

Approved
C. N. BLISS,
Secretary of the Interior.

It will be noted that in this letter from the Commissioner to the Register and Receiver at Duluth, it is stated, that said notice is to be published *to the end that all persons interested may have opportunity to present any claim they may have, to any of these lands.* If the Northern Pacific Railroad Company had made any selections of land within its indemnity limits from which it claimed an interest, such claim would come within the spirit of said notice. It is admitted by the defendants in their answer, (record P. 72) that said notice above referred to was given as set forth but no action was "required by the Northern Pacific Railroad Company to protect or enforce its rights to the land in question" for this reason the railroad company made no claim for any land under said notice.

The application of the Northern Pacific Railroad Company for the suspension of action looking to the disposal of lands listed and selected on account of the Northern Pacific grant east of the terminal established by the departmental decision of April 27, 1896, (23 L. D. 204) was denied by the Secretary December 13, 1897, (25 L. D. 501). The selection of land east of

Duluth for indemnity by the Northern Pacific Railroad Company were formerly cancelled from the records of the Duluth land office March 22, 1897. On Februray 28, 1898, (26 L. D. 65) the Secretary of the Interior directed a suspension of further entries of land lying east of Duluth (26 L. D. 265). On May 26, 1900, the order of cancellation heretofore made was recinded and the selection restored to the record.

It is claimed that under the decision of the Supreme Court in the case of Doherty v. Northern Pacific Railroad Company 177 U. S. 830, that the Secretary erred in the cancellation of the selection of this land claimed by the Northern Pacific Railroad Company lying east of Duluth. That the order directing the cancellation of the land granted to the Northern Pacific Railroad Company within its place limits was ineffective may be admitted, but that decision had nothing to do with the selection of land within the indemity limits, those lands were under the control of the Secretary of the Interior, and the railroad company had no interest in them until selections had been made and those selections approved by the Secretary.

The plaintiff having appealed to the Commissioner from the rejection of his application to purchase by the Register and Receiver for the reason that said application conflicted with a prior selection of the same land by the Northern Pacific Railroad Company, said Commissioner on October 3, 1901, made and rendered his decision—a copy of which is found in the record on page 6. The Commissioner states among other things, that the Northern Pacific Railroad Company on October 17, 1883, selected this land within the second indemnity limits in lieu of lands in Section 17 and 19—Township 133, North-Range 34—West, in the primary limits of the grant, but disposed of between the date thereof and

the definite location of the road, and that such selection has not since been abandoned nor the basis otherwise used.

That the selection, however, was cancelled by letter of March 23, 1897, because the land is east of Duluth, the then Eastern terminus of the grant under departmental ruling; subsequently the Supreme Court of the United States decided 177 U. S. 435 that the grant extended to Ashland, Wisconsin, and thereafter said cancellation was recinded and the selection restored by letter to the Register and Receiver of May 26, 1900. That on October 26, 1895, Charles D. Campbell (the plaintiff in this case) filed his application for Timber and Stone Entry of the SE¼ of the land in controversy, which was refused because of Company's selection. Campbell filed a request for a hearing, the purpose of which was to show the illegality of the company's selection of said land, on the ground that it was not the nearest available land to the designated loss, this was denied. Subsequently he submitted a petition for a hearing claiming that the basis so offered for selection is without right or foundation for patent, to which the Commissioner decides that the status of basis for the Company's selection is a matter entirely of record evidence, and not the subject of parol testimony. Such being the fact the Commissioner could see no reason for a hearing and the same was denied.

From this decision the plaintiff appealed to the Secretary of the Interior who on September 6, 1905, (Record P. 8) affirmed the decision of the Commissioner, basing his opinion on the departmental decisions in the cases of Eaton v. Northern Pacific Railway Company (33 L. D. 425) and that of August 30, 1905, (34

L. D. 105) of Jones v. Northern Pacific Railway Company. On November 7, 1905, (Record P. 93) the Secretary of the Interior approved the selection of the land in controversy by the Northern Pacific Railway Company, and on the 13th day of November, 1905, (Record P. 89) the land in controversy was patented to the Northern Pacific Railway Company.

Upon the facts above recited the appellant brought his action against the defendant the then owners of the legal title by virtue of the patent issued to the Northern Pacific Railway Company praying for a decree quitting his title to said land. This action was brought in the Distrct Court of the Eleventh Judicial District within the State of Minnesota, and the cause was removed on the petition of the defendants to the Circuit Court of the United States for the 5th Division of Minnesota, and such proceedings were had therein that a hearing was had on March 5, 1907, and a decree dismissing the bill with cost, was entered March 12, 1907. The Circuit Judge gave no reasons why said action was taken, which necessitated the appellant to appeal the case to the United States Circuit Court of Appeal for the Eight Circuit, which court after due consideration --the determination of which is embodied in its opinion affirmed the decree of the Circuit Court of the United States. The appellant has appealed this case and it is now before this court for its consideration.

ASSIGNMENT OF ERRORS.

FIRST: In adjudging that the Northern Pacific Railroad Company, under its charter, approved July 2, 1864, was entitled to indemnity for the loss of land which was the basis of the selection of the land in controversy in this case.

SECOND: In adjudging that the land described in this Bill of Complaint herein was not vacant public land subject to entry at the time Charles D. Campbell tendered his application to purchase the same.

THIRD: In adjudging that the land described in the Bill of Complaint herein which was situated on the north side of the line of the Northern Pacific Railroad Company could be legally selected as indemnity for the base land which was situated on the south side of said railroad line.

FOURTH: In not adjudging that the land described in the Bill of Complaint herein was not vacant public land subject to entry at the time Charles D. Campbell made his application to purchase the same, said land having been restored to the public domain by order of the Secretary of the Interior, July 27, 1897 (25 L. D., 48), prior to the date of the application of Campbell.

FIFTH: In adjudging that the claim of Charles D. Campbell to the land described in the Bill of Complaint did not come within the provisions of the Act of July 1, 1898, that it was not the intention of Congress in the enactment of said law to protect claims to land of such character.

SIXTH: The Court erred in the construction of the Act of July 1, 1898, in adjudging that its provisions only applied to settlers upon lands prior to January 1, 1898, and to those that purchased the same and completed their entry prior to January 1, 1898.

SEVENTH: In adjudging that Charles D. Campbell had no claim to the land described in the Bill of Complaint herein, that could be recognized, because the land was segregated from the public domain by the prior selection of the same by the Northern Pacific Railroad Company.

EIGHTH: In adjudging that under the act of Congress of June 3, 1878, entitled "An Act for the sale of timber lands in the States of California, Oregon, Nevada and Washington Territory" as amended by Act of August 4, 1892, extending the former act as to all of the public land States, no right attached to the land by virtue of the application to purchase tendered by Charles D. Campbell, that his claim to the land did not come within the purview of the Act of July 1, 1898.

NINTH: In adjudging that there was a valid selection of this land by the Northern Pacific Railroad Company, and that such selection could be legally approved by the Secretary of the Interior.

TENTH: In adjudging that the Northern Pacific Railway Company was the successor in interest of the Northern Pacific Railroad Company.

ELEVENTH: In adjudging that that patent issued to the Northern Pacific Railway Company for the land was valid.

TWELFTH: In not adjudging that under the evidence in this case the patent issued to the Northern Pacific Railway Company for the land in controversy w as issued without authority of the law and was void.

THIRTEENTH: In adjudging that the act incorporating the Superior and St. Croix Railroad Company, and the amendments thereto (its name being changed to the Northern Pacific Railway Company) authorizing said corporation to purchase this land and receive the title to the same from the United States.

FOURTEENTH: In adjudging that the title to the land described in the Bill of Complaint herein, was acquired by the Northern Pacific Railway Company by virtue of a sale made by the special master, as set forth in the answer of the defendants and as shown by the evidence in this case.

FIFTEENTH: The Court erred in dismissing the Bill of Complaint and the decree is erroneous in so ordering and adjudging.

ACT OF JUNE 3, 1878.

The several decisions of the land department in this case demand an examination of the act of 1878, to ascertain what rights the complainant has under that law, and whether the department by a misapplication o f the law to an admitted state of facts, has deprived the complainant of that to which he has acquired a right under the sanction of that act.

The act of June 3, 1878, provides that land valuable chiefly for timber, but unfit for cultivation, and which has not been offered at public sale according to law, may be sold to citizens of the United States in quantities not exceeding 160 acres to any one person at the minimum price of two dollars and fifty cents per acre. Any person desiring to avail himself of the provisions of this act

is required to file with the register of the proper land district, a written statement in duplicate, designating by legal subdivisions the particular tract of land he desires to purchase, this statement must be verified by the oath of the applicant before the register or receinver of the land office within the district in which the land is situated.

By an examination of the record in this case we find that Campbell made at different times, (See record Exhibits A, B and C) three separate written statements, in the manner required by law, to purchase this land; to-wit: October 26, 1895, November 9, 1896, and December 28, 1897. Each of these several application were accompanied with the sworn statement required to be made, and verified in the manner specified in the act, and each of these several aplications were rejected, for the same cause, to-wit, a conflit with the prior selection of this land by the Northern Pacific Railroad Company. An appeal from such rejection was taken in each case—first to the commissioner of the general land office and second to the Secretary of the Interior, where the claim of Campbell was finally rejected, and subsequently a patent was issued to the Northern Pacific Railway Company.

When the timber applicant files with the Register a written statement, verified as the law requires, he initiated a valid claim to the land; and has a preference right to purchase against everybody, but a prior claimant, and the United States. The prior claimant in this case, if any existed was the Northern Pacific Railroad Company. Whatever clai mit had to the land arose from its preliminary selection of this land on October 17, 1883. The United States never has asserted any claim other than the general one that the land belonged to the public domain. The existence of an adverse claim does not

effect the validity of the timber and stone filing, but such claim must be disposed of in some way before the claim of the applicant under the act of 1878 could be allowed, and when it appears in such case that there may be an adverse claim, a hearing should be ordered, and if it should be found that such adverse claim was valid, the rights of the timber aplicant would be disposed of. The authority of the department to cancel entries of this character upon sufficient proof that the land at the time of the filing of the written statemen was not subject to entry, is not disputed, but it is insisted that the department can only act in such cases within the law, the Secretary is not authorized to destroy a title to land in an arbitrary manner, for if he does he misapplies the law, and the courts will grant relief.

The decision of the Secretary gives no reason for the rejection of the application of Campbell to purchase this land. It refers us to the cases of Eaton v. Northern Pacific Railway Co. (33 L. D. 426) and Jones v. the same (34 L. D. 105) and says that "for the reasons given in said decisions these applications to purchase will stand rejected." In the examination of the case of Eaton v. Northern Pacific Railway Co. (supra) nothing is found bearing on the act of June 3, 1878.

In Jones v. Northern Pacific Railway Co. the Secretary said:

> "No vested right is acquired by a timber and stone application, while such an application, if presented in acordance with law, and for land subject thereto, reserves the land from other disposition by the land department, no right is initiated as against

the government, and prior to the submission and acceptance of final proof and the payment of the purchase price, the Secretary of the Interior may suspend the same from disposition and sale under the public laws."

It is not claimed that Campbell by his application became vested with the title to this land, all that is claimed for him is that by the filing of his statement he initiated a valid claim, which would ripen into a perfect title provided that it was not shown that a prior claim to the land existed, or that prior to the payment for the same the United States should make some other disposition of the land. It is not claimed that for cause appearing the Secretary could not suspend action, but that action does not go to the extent of the final rejection of the claim without the proof of a prior valid adverse claim to the land appeared after the applicant has had the right to contest the same, or some disposition of the land by the United States which would render the claim of Campbell of no value.

In this case the proof shows that when Campbell filed his written statement to purchase this land December 28, 1897, whatever effect the preliminary selection of this land by the Northern Pacific Railroad Company may have had, that selection had been cancelled, and prior to December 28, 1897, the land had been restored to the public domain and subject to disposal in the same manner as other public land, under the decision of the Secrtary of the Interior of August 27, 1896.

On January 23, 1897, a copy of a diagram relating to this land was transmitted to the local office at Duluth for the use and guidance of such office. (See record, page

Campbell proceeded in strict conformity, and therefore initiated a valid claim to the land under the act of

June 3, 1878. If he was prevented from acquiring title to the land by reason of the prior claim to the same made by the Northern Pacific Railroad Company, then it is claimed that he comes within the provisions of the Act of July 1, 1898, and under said act he should be allowed to proceed with his proofs and acquire the title.

I have before said that Campbell does not claim that by his aplication he obtained a vested right in this land. He insists, however, that being in all respects duly qualified to enter public land, by such application he obtained a preference right to purchase in case the land was offered for sale, in preference to all others, and that such right was a legal right which he possessed, which he could only be divested of by a valid prior adverse claim, or by an act of Congress otherwise disposing of the land. His right thus acquired could not be prejudiced by the refusal of the local officers to receive his proof, upon their declaration that the land was reserved, if in point of fact there was no reservation. Shepley v. Cowan, 91 U. S. 424 (1 ed).

An application for land under the act of June 3, 1878, is not that shadowy right which by some it is considered to be; until sanctioned by law, it has no existence as a substantial, but when covered by law, it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it. It is a well established principle, that where an individual in the prosecution of a right has done everything which the law requires of him to do, and he fails to attain his rights by the misconduct or neglect of a public officer, the law will protect him. In this case Campbell tendered his application for this land, which was accepted, his application was subsequently rejected, and the reasons assigned for said rejection was the conflict with the selection of said land by the Northern Pacific Railroad Company, if that

selection was void, or had been removed there was no legal ground for rejection of his claim. Campbell could do nothing more than offer his application, in due form to purchase the land. The proofs show that the aplication of Campbell was made in good faith, and in fact this is admitted, and that he would have paid for the land if he had been permitted to do so. Campbell's claim to said land, therefore stands in a light no less favorable than it would have stood, had he been permitted by the land officials to do what, in this respect he offered to do.

Lyttle v. Arkansas, 9 How. 153.

The officers of the government are simply the agents of the law. They are not permitted to act beyond its provisions, or make any compromises not sanctioned by it. Cunningham v. Ashley, 14 How 379; Lindsay v. Howes, 67 U. S. 267 (1. ed).

In Frisbie v. Whitney, 76 U. S. 668, (1 ed.), the controversy arose over the title to a tract of land which Frisbie claimed the legal and Whitney claimed the equitable title arising from his possession of the land, and his application to pre-empt the same. The court held that Whitney by his application did not acquire a *vested* right in the land, and after reviewing the cases on this subject, the court speaking through Mr. Justice Miller, said:

> If in any of these cases the party, asserting successfully his equitable interest, had not acquired a vested right in the just sense of that term, the cases ar still widely different from the one under consideration. In all those cases the successful party had established his legal right of PREFERENCE OF PURCHASE OVER THE OTHER, under the law as it stood when the land officers decided the case.

AND IT WAS THE ACTION OF THOSE OFFICERS, AND THEIR DISREGARD OF THE LAW IN REFUSING TO THE PARTY THE BENEFIT OF THIS PREFERENC IN PURCHASE, WHICH THIS COURT CORRECTED BY COMPELLING THE CONVEYANCE OF THE LEGAL TITLE ACQUIRED BY THIS VIOLATION OF THE LAW.

But in the case before us and in those to which the opinion of the Attorney General refer, it was Congress, the lawmaking power, which intervened and, by a new law, withdrew the land from the operation of the pre-emption laws, while the right of preference in purchase remained unexercised, and amounted to no more than a preference. The court may very properly correct the injustice done by the land officers, in refusing to accord rights, HOWEVER "INCHOATE" which are protected by laws still in existence; while they can only consider *vested* rights when those rights are sought to be enforced in opposition to the repeal or modification of the laws on which they are founded.

In this case the law remained the same as it did when Campbell made his application, and the sole cause of rejection was the supposed conflict with a prior selection of the same tract by the Northern Pacific Railroad Company. The decision in the case of Frisbie v. Whitney determines that the right of Campbell, however inchoate it might be, should be protected. If the claim of Campbell to this land conflicted with that of the Northern Pacific Railroad Co., then it was such a claim as would come within the act of July 1, 1898, and it should be adjusted under the provisions of that act. If it should be considered by the court as not of the character of claims provided for under that act, then we claim that independent of that

act Campbell had a preference right of purchase, which was disregarded by the land department, and for that reason the court should protect Campbell from the wrongful acts of the officers of the department and grant relief.

Hutchings v. Low, 82, U. S. 82, (1 ed).

THE ACT OF JULY 1, 1898.

Campbell claims that he is protected in his title under the provisions of the Act of July 1, 1898, which provides:

> "That where, prior to January 1, 1898, the whole or any part of an odd-numbered section in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor, is claimed to have attached by definite location or selection, has been purchased directly from the United States, or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States, or any ruling of the Interior Department, and where purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee, or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select, in lieu of the land relinquished, an equal quantity of public lands, surveyed or unsurvey * * * situated within any State or Territory into which said railroad grant extends, and patents shall issue for the lands so selected as though they had been originally granted."

What was the intention of Congress in the passage of this act; for when the intent is ascertained, it is to control its interpretation. The act is to receive such a construction, as will carry out the intent of Congress, however difficult it might be to give full effect to the language used. The object of all interpretation is to ascertain the intent of the lawmakers; to get at the meaning which they wish their language to convey. Courts are to accord a meaning, if possible, to every word in a statute. The admitte drules of statutory construction declares that a Legislature is presumed to have used no superfluous words. In putting a construction upon any statute every part must be regarded, and must be so expounded, if practicable, as to give some effect to every part of it, and where a given construction would make a word redundant, it was reason for rejecting such construction. No words are to be treated as surplusage or as repetition. The phrases in this act of the words, "purchased directly from the United States," or "settled upon," or "claimed in good faith," or by "color of title," or by "claim of right" must therefore each have some distinctive meaning. We are seeking for the intention of Congress, and to discover that we may also look at the paramount object which Congress had in view, in the passage of this act, as well as the means by which it proposed to accomplish that object.

In the case of Humbird v. Avery, Judge Lochren, in speaking of the act of July 1, 1898, (110 Fed Rep. 465), said:

> "The obvious purpose of this act was to provide a certain, speedy, and equitable way in which all controversies between the railroad grantee, or its successors, and purchasers or settlers upon odd-numbered sections within the place or indemnity

limits of the land grant who claimed by color of any law of the United States, or any ruling of the Land Department, should be settled and adjusted, without contest or litigation, either in the Land Department, or in the courts, the railway company by its express acceptance of the act became bound by its provisions, and obligated to carry out its terms. * * *

"The situation at the time of the passage of the act of July 1, 1898, was this: By reason of the erroneous ruling of the Secretary of the Interior as to the location of the Eastern terminus of said railroad, and his revocation of his prior approval of lawful selections by the railroad company of indemnity lands, and permitting sales and entries of such selected lands, as unappropriated, he had introduced confusion and conflict in respect to the right to such lands, which was beginning to be litigated in the courts; as the suits which resulted in the supreme court decisions above cited had then been commenced, and very much litigation seemed probable. The fact that patents had issued in a few instances would not end such disputes as to the lands so patented, as courts would adjudge the patentee in any case to hold the title in trust for the other party, wherever the other party had clearly the right to the land. The quieting of claims and titles to such a vast area of land, was matter of public concern, and it was proper and beneficent legislation on the part of congress to thus provide for the settlement and ending, with the full consent and through the voluntary action of the parties in each instance. * * * Complainants contention that the act of July 1, 1898, only applies to lands claimed by

"settlers" cannot be maintained. The language employed is broad enough to include all purchases from the United States, under any law, or ruling of the Land Department."

In the case of Humbird v. Avery, 195 U. S. 286-295 (L. ed.), Mr. Justice Harlan, in delivering the opinion of the court, said:

"Obviously, the first inquiry should be as to the object and scope of the act of 1898. Upon that point we do not think any doubt can be entertained, if the words of the act be interpreted in the light of the situation as it actually was at the date of its passage. Here were vast bodies of land, the right and title to which was in dispute between a railroad company holding a grant of public lands, and occupants and purchasers, both sides claiming under the United States. The disputes had arisen out of conflicting orders or rulings of the Land Department to remove the difficulties which had come upon the parties in consequence of such orders. The settlement of those disputes was therefore, as the circuit court said, a matter of public concern. If the disputes were not accommodated, the litigation in relation to the lands, would become vexatious. Extending over many years and causing great embarrassment. In the light of that situation Congress passed the act of 1898, which opened up a way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned, the government, the railroad grantee, and individual claimants. The railroad company evinced its approval of this action of the legislative department by a prompt acceptance of the act in its

entirety. By such unqualified acceptance the railroad company agreed that, so far as it had any claim to the lands in dispute, whatever the act of congress required to be done might be done.' Viewed in the light of these decisions can there be any question but that the intention of congress in the enactment of this law was to protect all claimants to land within the disputed territory, who prior to January 1, 1898, claimed such land under any law of the UUnited States, or any ruling of the Secretary of the Interior."

The right to the benefit of the act was fixed at the date when in good faith Campbell made his claim to the land. The decision of the Land Department that none are entitled to the benefits of this act except a purchaser whose entry is completed by payment prior to January 1, 1898, or a "settler" on the land prior to that date, is a construction altogether too narrow. It not only violates the fundamental rules of statutory construction, but leaves open to litigation a vast number of disputed claims that it was the intention of Congress by this act otherwise to pispose of. The regulations issued to facilitate the adjustment by the land department of conflicting claims to lands within the limits of the grant to the Northern Pacific Railroad Company under the act of July 1, 1898, (28 L. D. 103); and the construction placed upon the act by the land department, as to who were the beneficiaries under the act is stated in paragraph 1, on page 105, in which the Secretary of the Interior said:

"The act designates a class of beneficiaries whose status is that of claimants adverse to the Northern Pacific Railroad Company or its successor in interest, and in doing so, different words and terms of description are used in different portions

of the act, but considering the act in its entirety, and giving due recognition to each provision therein, this class embraces any qualified person who, prior to January 1, 1898, by settlement, entry, or purchase initiated in good faith a claim to lands of the description given "under color of title or claim of right under any law of the United States or any ruling of the Interior Department" and who is still maintaining such claim conformably to such law or ruling."

Subdivision C, paragraph 8, under the head of "What are the claims which come within the provisions of this act?" is answered:

> "An individual claim adverse to the railroad claim is one which prior to January 1, 1898, was INITIATED IN GOOD FAITH by some qualified person, by settlement, entry, or purchase "under color of title or claim of right under any law of the United States or any ruling of the Interior Department, * * * and which is still maintained conformably to such law or ruling, and is one which, in the absence of the railroad claim, could be perfected into full title."

Campbell's application being rejected and the land subsequently patented to the Northern Pacific Railway Company, closed the door to any further proceedings under the act of June 3, 1878.

The application of Campbell made December 28, 1897, was the initiation of a claim to the land, and was one which in the absence of the railroad claim, could be perfected into full title. The land was open for sale when Campbell tendered his written statement. He had done all that he could do to perfect his right to the title of the United States. He had a legal right in

this case to be preferred when a sale was made. His claim was good against everybody but the one holding a prior claim, which in this case could only be the Northern Pacific Railway Company—and the act of July 1, 1898, extinguished that claim. It is not within the power of the Land Department to arbitrarily destroy a title initiated under any of the land laws of the United States, but that is what has been done in this case.

UNDER THE ACT OF JULY 2, 1864, THE NORTHERN PACIFIC RAILROAD COMPANY WAS LIMITED TO TEN ALTERNATE SECTIONS OF LAND PER MILE ON EACH SIDE OF ITS RAILROAD, WHENEVER IT PASSES THROUGH A STATE.

Sec. 3 of the act of July 2, 1864, enacts that there be, and hereby is granted to the Northern Pacific Railroad Company:

> "Ten alternate sections of land per mile on each side of said railroad whenever it passes through a state."

It also provided an indemnity limit of not more than ten miles beyond the limits of said alternate sections, for the selection of an equal quantity of land that had been disposed of by the government within the place limits of its grant, when the line of its road had been definitely fixed. Beyond these lateral limits the company could not seek indemnity. The intention of Congress in making this grant was not only to have this road constructed but that the burden of its construction should fall equally on each side of this road, for each side would be equally benefited. If on fixing the line of the definite location, it was found that lands had been "granted, sold, reserved, occupied by homestead settlers, or pre-empted,

or otherwise disposed of," other lands should be selected by said company in alternate sections and designated by odd numbers not more than ten miles beyond the limits of the alternate sections. The act provided that this ten mile limit should be on each side of the railroad line. The grant of July 2, 1864, to the Northern Pacific Railroad Company, was ten alternate sections of land per mile on each side of the railroad line whenever it passes through a state. The language is plain, no construction of its meaning or the intention of Congress in using those words is necessary. It was not a grant of twenty sections of land per mile, or a permission to take 15 sections per mile on one side and five on the other, as might suit the convenience of the company. The grant to the Northern Pacific Railroad Company was not one of quantity, but for a certain number of sections in place, and if not found, then the company were allowed to look for the deficiency in other restricted limits, but such selection must be made of the lands on the same side of the road, that the lands lost to its grant were situated.

If the company does not get its full amount of lands within its primary limits, and fails to make up its loss within its secondary limits on the same side of the line of its road in which the loss occurred, then it is a barren right. It is the happening of a contingency plainly contemplated in the granting act, subject to which the company made its contract.

If there were only nine sections of land per mile subject to appropriation by the company within its place limits on the south side of its road, at the time of the definite location of its road, the company would have a right to select on the south side of its road one section of land within its first indemnity limits, not more

than ten miles beyond the granted limits, if the land could not be found within the first indemnity limits, and the loss to the grant was subsequent to its grant and prior to its definite location, then under the joint resolution of May 31, 1870, the company could go into the second indemnity limits to make up the deficiency, but it must be on the same side of the road the loss occurred.

I am aware that this rule has not been observed, by the Department in allowing the selections for deficiency by this railroad company. It has been and at the present time is the practice of the land department to allow the Northern Pacific Railroad Co. to roam anywhere within the lateral limits of its grant, and select land as indemnity,—without regard to its location on the one side or the other of its line of road. That the department is in error in the allowance of such selections. I refer to the decision of the United States circuit court, in the case of the United States v. Burlington & Missouri River R. R. Co., 4 Dillon 287, and afterwards affirmed in the Supreme Court of the United States, 98 U. S. (I. ed), 198.

The syllabus in the case in the Circuit Court of the United States—the opinion in that case being delivered by Mr. Justice Miller, one of the justices of the Supreme Court of the United States—is as follows:

> "There was no authority in the grant to issue patents for land on the north side of the defendant's road, in lieu of lands deficient on the south side of its road, and such patents are void. But in the bill to have such patents declared null the lands must be described or identified."

By Section 18 of the act of Congress of July 2, 1864, (13 Stat. at Large 356), amending the act of 1862 (12 Stat. at Large 489), "To aid in the construction of a Railroad and Telegraph line from the Missouri River to the Pacific Ocean and to secure to the government the use of the same for Postal, Military, and other purposes." The Burlington and Missouri River Railroad Company, an existing corporation under the laws of Iowa, was authorized to extend its road through the Territory of Nebraska, etc.

Section 19 of the act is as follows:

> "That for the purpose of aiding in the construction of said road, there be, and hereby is, granted to the said Burlington and Missouri River R. R. Co. every alternate section of public land (excepting mineral lands as provided in this act) designated by odd numbers, to the amount of ten alternate sections per miles on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

With the exception that this railroad had no lateral indemnity limits, the grant was similar to that in aid of the construction of the Northern Pacific Railroad Company. The United States brought its action to vacate and declare void the patents issued for certain lands on the north side of said road selected for indemnity for an equal amount of land lost to its grant on the south side of its road. On this question Mr. Justice Miller, speaking for the court, said:

"It is alleged that 150,000 acres of land lying on the north side of defendant's road, has been patented in lieu of lands found deficient on the south side of said road, and that the patents so issued are void. I am of opinion that the act of Congress did not intend to grant twenty sections per miles on each side of the road, that no right to take more on either side of the road than what amounted to ten sections per mile on that side was conferred. If, for any reason, the required number of sections could not be found on one side, it was as in the case of similar deficiency in the twenty mile limits of the other road, a loss which congress had made no provision to supply. THERE EXISTED THEREFORE NO POWER IN THE OFFICE OF THE LAND DEPARTMENT TO ISSUE PATENTS FOR LANDS ON THE NORTH SIDE FOR THOSE NOT FOUND ON THE SOUTH SIDE. If the lands so patented can be identified I think that as to these the patent conveys no title."

The case was appealed to the Supreme Court of the United States, and is found reported in the 98 U. S. (L. ed.) 198. Mr. Justice Field delivered the poinion of the court, on this subject he said:

"It only remains to notice the further objections to the patents, that lands to the amount of 150,000 acres on the north side of the road is included in them in lieu of land deficient on the south side. It is true, the act of Congress contemplates that one-half of the land granted should be taken on each side of the road; and that the department could not enlarge the quantity on one side to make up a deficiency on the other, but the answer to the

objection as presented by the bill, either in its original form or as amended, is that it is not shown what this land was, and the patents can not be adjudged invalid as to any land not identified; so as to be capable of being separated; nor can any decision go against the company for its value without such identification. It is possible that the land to which the company was entitled is not so described in the patents that it can be separated from that which should not have been patented. If such be the fact, the government may be without remedy."

In the case under consideration, the land patented can be identified; it is the SE¼, Sec. 21, T. 54 N., R. 12 W., it was selected by the Northern Pacific Railroad Company as indemnity for the loss of the SE¼, Sec. 19, T. 133 N., R. 34 W. The defendants in their answer:

> "Admit that the basis of the railroad selection was the loss of the SE¼ of Sec. 19, T. 133 N., R. 34 W., which is about 147 miles (not 200 miles as alleged in the bill) west and 50 miles south of the land in controversy; the lost lands being on the south side of the railroad line while the selected land is on the north side."

With this admission on the part of the defendants, we might with confidence rest our case the law governing it has been determined by the courts. It declares that the land department was without authority to patent this land to the Northern Pacific Railway Co., the patent therefore is void, and conveys no title. If the patent is void, the selection of this land by the railroad company must also be void. If so, then there was no valid adverse claim to this land when Campbell filed his written statement and offer to purchase, it follows that

he is entitled to proceed and complete his entry by payment and receive the usual evidence of title to this land.

The case of the Southern Pacific R. R. Co. v. Smith and others, decided May 18, 1896, and reported in 74 Fed. Rept. p. 588, is on all fours with this case which we are now considering. The lands in controversy in that suit was patented to defendant Smith, and the Southern Pacific R. R. Co., claimed to be entitled to them by virtue of a congressional grant, and brought its suit to obtain a decree that the title conveyed by the patent is held in trust for it, and to compel the conveyence thereof to the complianant, and to enjoin the defendants from asserting any title to the lands.

The terms of the grant under which the complainant claims, are to be found in an act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific Coast (14 Stat. at L. p. 292). The third section of this act is an exact copy of the 3d section of the act of July 2, 1864, by which the Northern Pacific Railroad Company was incorporated. So far as applicable to the present case, it was a grant of every alternate section of public land, not mineral, designated by odd numbers, to the amount of 10 alternate sections per mile on each side of the road to which the United States should have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time such route should be designated by a plat thereof, filed in the office of the commissioner of the general land office; and where, prior to that time, any of the sections or parts of sections should be granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, the act provided that other lands should "be selected by

said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." It appears that the line of definite location of said road was fixed April 3, 1871, and on April 21, 1871, the commissioner of the general land office, by direction of the Secretary of the Interior withdrew the odd numbered sections of land within 30 miles of the railroad line from sale, location, pre-emption, or homestead entry, which order of withdrawal has ever since continued in force and effect, the railroad was thereafter constructed and fully equipped, and was accepted and approved.

On October 3, 1887, the complainant filed its indemnity list No. 25 in the proper land office within which district the lands in controversy were situated, describing the tracts in controversy as selected by the complainant in lieu of the lands lost to complainant; the indemnity list was in due form. The filing of the list of selection by the railroad company was prior to a settlement or entry of the lands by defendant Smith, his application for said land having been made December 7, 1887, more than two months after the filing of the list of selection by the railroad company. When the railroad company filed its list of selections, the land in controversy was vacant and unappropriated, to which the United States had full title. The lands lost to the railroad company were situated on the north side of its road as definitely located and constructed, while the lieu lands were situated on the south side of said railroad line, defendant Smith made a pre-emption filing which is similar to a timber and stone application.

From these facts the court said:

"The lands in controversy are within 30 miles of, but more than 20 miles from, the road as definitely located an deonstructed, and, if vacant and unappropriated, were subject to be taken as authorized by the law, to make good losses sustained by the complainant within the primary limits of its grant. Complainant attempted to select these lands, which are situated on the south side of its road, on October 3, 1887, in lieu of lands situated on the north side thereof, within the primary limits of its grant, and which were lost to complainant, by including them in a list filed on that day in the proper local land office, in the form and accompanied by the certificates, affidavits, and fees required by law. This was prior to any attempt at settlement on, or entry of, the lands by the defendant Smith; his settlement, which was the basis of the patent subsequently issued to him, having been made December 7, 1887. * * *

The land in controversy being within the indemnity limits of the complainant's grant, and being at the time of the complainants attempted selection of them, vacant and unappropriated, to which the United States had full title,—and not falling within any of the exceptions of the grant, and the complainant having done all in its power to select them by filing in the proper office its claim to them in due form, accompanied by the affidavits and certificates required by law, and paying the proper fees, I think it clear that it is entitled to maintain the present bill unless it be, as contended on the part of the defendants, that indemnity lands on one side of the road can not be selected to make good losses sustained by the complainant on the other side. That they can not is, I think, in effect, held

by the Supreme Court in the case of U. S. v. Burlington & Missouri River R. R. Co., 98 U. S. 334-342. On the authority of that case, a decree will be entered sustaining the plea, and dismissing the bill."

The land involved in this controversy is the SE¼, Section 21, T. 54 N., R. 12 W. It was selected by the Northern Pacific Railroad Company as indemnity for lands in the SE¼ of Section 14, T. 133 N., R. 34 W. The lost land is south of the line of road, while the selected land is north of said line of railroad. If the decision in the case of Southern Pacific R. R. Co. v. Smith (supra) is good law, and it must be considered as such, as the Southern Pacific R .R. Co appears to have acquiesced in the same, then under the rulings of that case and that of the Burlington case the complainant in this case should on this question alone be entitled to a decree of this court in his favor.

The act of Congress of July 2, 1864, creating the Northern Pacific Railroad Company and granting it aid for the purpose of the construction of a railroad from Lake Superior to Puget Sound under the provisions of Section 4 of said Act (13 Stat. at L. 368), enacted, "That whenever said 'Northern Pacific Railroad Company' shall have 25 consecutive miles of any portion of said railroad and telegraph line ready for service completed, the president of the United States shall appoint three commissioners to examine the same, and if it shall appear that 25 consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the

president of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situate opposite to the coterminous with, said completed section of said road; and, from time to time, whenever 25 additional consecutive miles shall have been constructed, completed and ready as aforesaid and verified by said commissioners to the president of the United States; then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every 25 miles of said road is completed as aforesaid."

By this section, the Northern Pacific Railroad Company was divided into sections of 25 miles for adjustment, and the railroad company would have no claim or right to any land not embraced within the 25 miles of road that had not been certified and completed as specified in this provision of the act, and no legal selection of indemnity for lands lost within the place limits of its grant could be selected unless the lost land was within some completed section of the 25 miles, and the land selected in lieu thereof was also within the same completed portion of the road. Can there be any question about the correctness of this proposition?

The Northern Pacific Railroad Company began the construction of its road in 1871, at a point in Section 1, Tp. 48 N., R. 17 W., upon the definite line of its route and continued westerly on that line. The map of the general route of said road was filed with the Commissioner of the General Land Office August 13, 1870.

On the 6th of July, 1882, the Northern Pacific Railroad Company filed its map of definite location of its

road from Sec. 1, Tp. 48 N., R. 17 W., easterly to Ashlan, Wisconsin. The definite line of location diverges materially from the line of general route. This line of definite location is indicated by the black line on the map in the record of this case (Record page 122). Sec. 1, Tp. 48 N., R. 17 W., is at a point called Thomson Junction. From that point to Bluff Creek in Superior, Wisconsin, at a point in Sec. 32, Tp. 49 N., R. 13 W., is 25 miles from Thomson Junction, on Sept. 19, 1882, a map of this 25 miles of constructed road from Thomson Junction to Superior was filed in the land department, and a diagram showing the 20, 30 and 40 mile limits of the grant opposite said constructed road adjusted to the line of definite location was prepared by the Commissioner and filed in his office. The eastern terminus of the 25 miles from Thomson Junction is indicated by the line shaded yellow on the map (Record page 122). It was this 25 miles within which the Northern Pacific Railroad Company selected its lands on its list of selections October 17, 1883, at that date the eastern terminus of the Northern Pacific Railroad Company was not further east than Sec. 32, Tp. 49 N., R. 13 W., which was at Superior. In 1887 the railroad was completed to Ashland, Wisconsin, and was certified as completed and accepted by the president of the United States in that year. All east of the line shaded yellow on the map (Record p. 122) which indicates the lateral limits eastwardly of the 25 miles from Thomson Junction and embraces all the lands in controversy in the litigation, has no foundation to base selections for indemnity for lands lost prior to October 17, 1883. I contend that as the eastern terminus of the road was on October 17, 1883, at Superior, there was therefore no authority to make a diagram embracing land east of that point, and all the lands embraced in this fan shape diagram which was at that

time coterminous with the uncompleted portion of the road were not subject to selection, and therefore the lands selected at that date were not subject to selection, and thus the selections made at that date were void. If I am not correct in this legal proposition, I would like to have some one point out the error. If I am correct then all the lands falling within this fan shape diagram were not on October 17, 1883, subject to selection by the railroad company, and therefore it has no claim to the same.

It would therefore be incumbent upon one defending title to land claimed under such selection, to offer evidence showing the completion of the road, the appointment of commissioners, their reports and the acceptance of such report by the president of the United States. The filing of a selection list by the Northern Pacific Railroad Company wherein this land was shown to be selected in lieu of lands lost within the place limits of its grant, would be no evidence standing alone of the right of said company to select said land.

THE SELECTION OF THIS LAND FOR INDEMNITY, WAS VOID UNDER THE RULINGS OF THE DEPARTMENT AND THE DECISIONS OF THE SUPREME COURT.

To make a valid selection of lands in lieu of lands lost within the primary limits of the Northern Pacific Railroad Company's grant, the selection must be made in accordance with the decisions of the Supreme Court, and the rulings of the department. If not so made, then the listing of the land is of no more effect than if it had never been made.

Under the joint resolution of May 31, 1870, the company could receive no lands within the second indemnity limits of its road until it was made to appear that the quantity of lands in the first indemnity limits were insufficient to make up the deficiency. In the case of the Northern Pacific Railroad Co. vs. Bass, 13 L. D. 201, (decided August 24, 1891), it was held that the company must exhaust the lands within the first indemnity limits before it can get title to lands in the second, and refers to a rule made by the land department, the purport of which is as follows:

> "The Northern Pacific Railroad Company has no authority to select lands in the 40-mile limits until it shall be positively ascertained that the quantity to make up the full complement of its grant.

It must further appear that the land claimed to have been lost in the place limits of the grant, was sold, or disposed of subsequent to the date of the grant and prior to the date of the definite location of the road. These facts must appear in some form at the date of the filing of the list of selections, they are not of a character that can be assumed to exist; neither is it within the power of the commissioner, after the filing of the list, and upon further examination to discover their existence. It may be, that between the railroad company and the government, if upon further examination these facts were found to exist, the government might waive compliance, but when the rights of an individual has intervened, no essential facts that does not appear on the selection list at the time of the filing of the same in the local office can be added, implied, or assumed, by the

commissioner, or by any other person in order to sustain the selection. The selection must stand or fall as it appeared when filed in the local office.

The affidavits attached to selection list No. 15 and No. 15 B, supposed to show the facts required, are found on pages 14, 15 and 16 of the complaint. It will be noticed that in no place in these affidavits, is it stated, "that said losses have not heretofore been indemnified in any manner," as required by the circular of Aug. 4, 1885, (4 L. D. 90, neither does it appear, "that losses assigned for the bases in this list occurred from disposals subsequent to the passage of the act of July 2, 1864, and prior to the definite location of the road, as required by the joint resolution of May 31, 1870."

The land commissioner of the Northern Pacific Railroad Company, however, does state, in list No. 15 B, that he has "herein designated the lands heretofore selected as indemnity in said Duluth list No. 15, and no other lands." In selection list No. 15, the number of acres of lost land appearing in that list was 43,548.12 acres. In list No. 15 B, there only appears 32,678.19 acres, being 10,870 acres lost land than in selection list No. 15.

There does not appear in the affidavits attached to these selection lists facts sufficient to justify a selection of lands within the second indemnity limits of this railroad company.

Northern Pacific R. R. Co., 18 L. D. 596.

In the case of Jones v. Northern Pacific Ry. Co., 34 L. D. 105, made a part of the Secretary's decision in this case; it is said that any requirement for the specification of a loss as a basis for indemnity selection is only for departmental information, and as an aid in the adjustment of the grant. That the act of 1864, and the

resolution of 1870, each establish a limit beyond which the company cannot go in making its general selections; that in neither is there any requirement limiting such selections to the lands nearest the sections in which the losses to the grant occurred, and to so limit such selections would attach a condition or limitation upon the right of selection not found in the granting act. The Secretary's duty in the premises, it is said, is to supervise the administration of the grant, this supervision however does not permit him to abridge or enlarge the laws of congress, it is only necessary for him to see that the selections made in satisfaction of the grant are confined to the lands described in the granting act, but as between different sections equally within the descriptions contained therein, the Secretary can not say which may or which may not be selected, for in doing so he would be denying the railroad company the right to make the selection. In other words the railroad company in making its selections for indemnity, can select any land within the lateral limits of its grant, and the Secretary has no right to abridge this right. The land may be either within the first or second indemnity limits of the grant, but it need not be the nearest to the line of the road or nearest to the section where the loss occurred, and he closes this subject by adding that:

> "It might also be stated that it is learned upon inquiry at your office (that is the Commissioner's) that at least as to lands within the second indemnity belt, a strict adherence thereto, (that is in selecting lands nearest to the line of the road or to the land lost) has not been enforced."

It would appear from this that the Secretary of the Interior and the Commissioner of the General Land

Office agree upon this subject; that they are a law unto themselves; that any act done by them without authority, makes all its parts valid, and the more frequently they do what is forbidden by law, the stronger the claim for the enforcement. It is safe to affirm that neither the Secretary nor the Commissioner will obtain immortality based upon this decision. The Secretary of the interior is but a servant of the people, subject to the law the same as others. He is to administer the laws of Congress, not his own. This decision overturns a long line of cases going back for thirty years, and the reason for so doing must be stronger than appears in this case. In the Northern Pacific R. R. Co., 17 L. D. 404, (decided Oct. 14, 1893, on this subject the Secretary uses the following language:

> "It is a well settled principle, carried through all the legislation pertaining to lands grants to aid in the construction of railroads, that indemnity lands must be taken nearest to lost lands, so that the portion of the country benefited by the building of the road may bear the burden of the grant made to aid in its construction. The co-terminus principle, applied to nearly all the grants, was evidently intended to accomplish this result, were it otherwise, the company might also pass over the bad lands within the limits of its grant and pick out the best lands, which it has evidently done in the present case."

On review of this case, 20 L. D. 187, (decided March 12, 1895), the Secretary said:

> "It has for years been the doctrine of this department; that in all kinds of railroad grants providing for indemnity, the selection must be of lands subject thereto, nearest to lands lost. * * * The

burden was upon the Northern Pacific R. R. Co. to show that in the selection of lieu lands it has in fact selected the nearest vacant unappropriated lands to the lands lost.

Such examination should include the lands along the line of the road lying between the lands lost and the land to be selected. If the land could be selected anywhere within the lateral limits of the company's grant no such examination would be required. In Atlantic & Pacific R. R. Co., 8 L. D. 375, (decided March 29, 1889), referring to the circular of August 4, 1885, Secretary Noble held that "indemnity selections should be made from lands nearest the granted sections in which the loss is alleged," citing Wood v. Burlington & Missouri River R. R. Co., 104 U. S. (I. ed.) 772, in which the court used this language:

> "Although there was no express limitation of the distance from the road in which the land was to be selected, it was necessarily implied that the selections should be made of alternate sections nearest the road of which the land had not been previously sold, reserved, or otherwise disposed of. The company was not at liberty to pass beyond land open to its appropriation and take lands further removed from its road. In all grants which are to be satisfied out of sections along the line of a road it is necessarily implied, in absence of specific designation otherwise that the land is to be taken from the nearest undisposed sections of the character mentioned. Such grants give no license to the grantee to roam over the whole public domain lying on either side of the road in search of land desired. The grant must be satisfied out of the first land found which meets the conditions named."

In Wisconsin Central R. R. Co. v. Forsyeth, 159 U. S. (1. ed.) 71-75, (decided June 3, 1895), Justice Brewer in delivering the opinion of the court said:

> "The expectation is that the company receiving the odd sections will take pains to dispose of them to settlers, and thus by their settlement and improvement increase the value of the even sections adjoining and so justify the added price. To fully realize this expected benefit it is essential that the land taken by the company shall be as near to the line of the road as possible; and so, WHILE SELECTION OF REMOTE LANDS IS PERMITTED, IT IS ONLY WHEN AND BECAUSE THERE IS A NECESSITY FOR SUCH SELECTION TO MAKE GOOD THE AMOUNT OF THE GRANT. Obviously, therefore, an act must be construed to realize as far as possible, this interest and to accomplish the desired result.

The validity of the selection of this land, has been determined in the land department adversely to the claim of the complainant * * but it was so determined not upon a question of fact, but upon the construction of law, and that construction contrary to the decisions of the Supreme Court; it has been repeatedly held that a decision of the land department on questions of law, is not conclusive on the courts. The selection of this land being void, no authority existed in the land department to issue a patent to the railroad company for the same, such want of authority makes void the patent, and conveyed no title.

THE ORDER OF JULY 9, 1896, HOLDING FOR CANCELLATION THE PRELIMINARY SELECTIONS, THERETOFORE MADE BY THE NORTHERN PACIFIC R. R. C. THE DECISION OF THE

SECRETARY OF THE INTERIOR DATED AUGUST 27, 1886, (23 L. D. 204), FIXING THE EASTERN TERMINUS OF THE NORTHERN PACIFIC R. R. CO. AT DULUTH, AND THE ORDER OF MARCH 22, 1897, CANCELLING THE SELECTIONS OF LAND LYING EAST OF DULUTH.

It will be noticed that prior to the decision of the Secretary dated August 27, 1896, fixing the eastern terminus of the grant to the Northern Pacific R. R. Co. at Duluth, the land department by its order of July 9, 1896, held for cancellation, the preliminary selections of said company to all lands lying east of Duluth. That after the decision of August 27, 1896, was made, and on March 22, 1897, another order was made finally cancelling said selections. It would therefore appear that there were two questions involved in these orders, and decision: First, the order cancelling the selections, and 2d the decision of the Secretary as to the eastern terminus of said railroad. The 1st was a question of fact, the 2d may be considered a question of law and fact. The land in controversy is within the second indemnity limits of the grant to the Northern Pacific Railroad Company. The authority to select the same must be found in the Joint Resolution of Congress dated May 31, 1870. That resolution declares that the company, "shall be entitled under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter as will make up such deficiency. The selection of said land by said company was merely preliminary. There was no approval by the land department prior to the filing of Campbell's statement. The Secretary not only by his order cancelled these selections, but restored the land

to the public domain, and declared them subject to disposal in the same manner as other public lands. This order was not revoked until after Campbell had applied for the land. There was nothing said about the cancellation by the Secretary of these selections either in the case of Doherty v. Northern Pacific R. Co. 177 U. S. (1. ed.) 830, or in United States v. Northern Pacific R. Co. 177 U. S. (1. ed.) 836. Those cases simply decided that the eastern terminus of the Northern Pacific Railroad Co. was at Ashland, Wis., instead of Duluth, Minn. The Secretary of the Interior was simply in error as to that question—but it did not follow that because he erred in judgment as to that question the order of cancellation was also void. That was a matter in which he alone had jurisdiction. It was exclusively within his control. The Northern Pacific Railroad Company could obtain indemnity only through the Secretary of the Interior, for the resolution provides that the company shall receive under the direction of the Secretary, so many sections as will make up such deficiency. The cancellation of the selections was within the scope of the authority of the Secretary and on questions of this kind his decision is generally conclusive everywhere, even in a court of justice, nor can it be reversed or corrected in a collateral proceeding between private parties. The Secretary must pass upon many questions, previous to the approval of selections. His judgment upon these matters is that of a special tribunal, and is unassailable except in direct proceedings for its annulment. When the law has confined to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others. The railroad company had no vested right in these selections, the Secretary acted within the scope of his authority—the selections were in fact cancelled, and the

land restored to the public domain. Whether the cancellation was right or wrong it was beyond the power of collateral attack, in a controversy between private parties.

The Northern Pacific Railroad Co. claim to have made its selection of this land October 17, 1883, more than 23 years ago. There is no valid reason why, if said railroad company was entitled to this land, it should not have been awarded to it years ago. It is in evidence in this case that on a sale of the lands granted in aid of the construction of this road, to enforce the payment of the several mortgages given by said Northern Pacific Railroad Co. to the Farmers' Loan & Trust Co., that 38,000,000 acres were disposed of to the Northern Pacific Railway Co. Why is it that the legal title to this enormous quantity of land is still held by the government, that this land grant has not before this been adjusted, and the lands to which the company should have a title passed to it, and it required to bear its equal proportion of taxes, as land owned by private individuals. It is well known that no patents are issued to said railroad without its requests and experience has shown that the holder of unproductive real estate is poor, and the more he owns the poorer he is. One thus situated will use his best endeavors to dispose of the same shifting this burden on the shoulders of others, but as long as the government will hold these lands in trust for the railroad; and thus the company escapes the burdens that would arise from the ownership of the same, just so long will the title be allowed to remain in that condition, awaiting the increased value from the labor of others, and the settlement of the country.

The remarks of the court in St. Paul, etc., R. R. Co. v. Winona R. R. Co., 112 U. S. (1. ed.) 872-876 are appropriate here:

> "Was there a vested right in this company, during all this time, to have, not only these lands but all the other odd sections within the twenty mile limits on each side of the line of the road, await its pleasure? Had the settlers in that populous region no right to buy of the government because the company might choose to take them, or might after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market and withdrawn from taxation and forbidden to cultivation?"

THE NORTHERN PACIFIC RAILWAY COMPANY IS NOT THE SUCCESSOR OF THE NORTHERN PACIFIC RAILROAD COMPANY.

There is no evidence in this case that the Northern Pacific Railway Company, is the successor of the Northern Pacific Railroad Company. That is a fact to be established by evidence, not assumed to exist by reason of the assertion of the fact by the Northern Pacific Railway Company. The act of July 2, 1864, incorporating the Northern Pacific Railroad Company, was in the nature of an agreement, wherein the United States was one of the parties, and the Northern Pacific Railroad Company was the other. This agreement could not be changed or modified in any material respect without the consent of both parties. The grant to that company of 50,000,000 acres of the public domain, to aid in its construction, was

on compliance with certain conditions on the part of the railroad company. The United States was not only interested in having this road constructed, but it was concerned in many other ways, for the performance of which, on the part of the railroad company, it reserved to itself the right at any time to add to, alter, amend, or repeal this act. That is expressed in Sec. 20 of said act, which reads as follows:

> "That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefit of the same for postal, military, and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this Act."

The interest of the United States in this road was not to end on the completion of the same, there was no limit to the time when the rights of the government should cease; it was to continue as long as "grass grows, and water runs." It can not be said that the interest of the government in this road was ended, when the stock and bondholders of this road deemed it to their interest to change the terms and conditions of the original charter, without the consent of Congress.

After the completion of this railroad in 1887, a scheme for its sale was advocated. An agreement having been made with certain of its bondholders, and the Great Northern Railroad Co. required that the mortgages given by the Northern Pacific Railroad Company, to the Farmers' Loan and Trust Co. should be foreclosed. It also contemplated placing the road in the hands of receivers. The action of the receivers caused trouble

with its employes, which was designed to depreciate the value of the property of said road. To more perfectly carry out this scheme, it became necessary to ressurect the defunct Superior & St. Croix R. R. Co. and breathe into it the breath of life. This was done by the Legislature of Wisconsin April 15, 1895. This railroad was not only to purchase the personal property but also the land granted to the Northern Pacific Railroad Company, and after such purchase, these bondholders were to issue the bonds of this new road, in the amount, and for the purpose stated in the agreement between them and the Great Northern Railroad Co. Such agreement is referred to in the case of Pearsall v. Great Northern Railroad Co., 161 U. S. (l. ed.) 838. The decision in that case, (which was rendered March 30, 1896), upset this scheme, and another one was devised. On April 8, 1896, only six days after that decision Senator Mitchell of Oregon, introduced in the Senate the following joint resolution:

> "To facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding $2.50 per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person, or association of persons owning, operating, or controlling parallel or competing railroad; which was read the first and second time by unanimous consent and referred to the committee on the judiciary."

On April 21, 1896, the committee on the judiciary, reported the joint resolution with amendments, and submitted a report, a part of which reads as follows:

"The purpose of this proposed legislation may be stated in a few words. It has been made to appear to your committee that the land grant and other property of the Northern Pacific Railroad Company, all of which is covered by mortgage liens, will at a very early date be sold under foreclosure proceedings. This joint resolution, should it become a law, will enable the purchaser, at such foreclosure sale, upon filing in the office of the Secretary of the Interior a copy of the deed or deeds conveying to them said property, together with a certificate signed by a majority of them, setting forth the name adopted by them, the names, number, and residence, respectively, of the directors of the proposed new company, and a copy of any plan of reorganization adopted by said purchasers, or pursuant to which such purchase shall have been made, to reorganize under the name specified in such certificate, so that they, their associates, successors, and assigns shall have and be invested with all the estate, right, title and interest of such purchasers, in and to such railroad and property, and shall possess franchise, rights, and powers, the same as the Northern Pacific Railroad Company now possesses; such new company to be subject to all the obligations and duties imposed by Congress upon the Northern Pacific Railroad Company. * * * The resolution also provides that nothing in it contained shall be construed as making any additional grant of lands to such successor corporation, or as a waiver of any right of the United States now existing to enforce any forfeiture of lands heretofore granted to the said Northern Pacific Railroad Company, or as in any manner affecting the vested rights of any settler or settlers on any of the lands heretofore grant-

ed to the Northern Pacific Railroad Co. or any purchaser or purchasers of such lands from said company. The right to alter, amend, or repeal this resolution is also by express terms reserved to congress."

On January 23, 1897, the joint resolution came before the senate for action, objection being made to its consideration, the joint resolution was not acted upon, nothing further was done by Congress.

On July 1, 1896, the corporate name of the Superior & St. Croix Railroad Co. was changed to "Northern Pacific Railway Co." which name was adopted as the corporate name of the Superior & St. Croix Railroad Co.

These proceedings in the senate abundantly show that those interested in this scheme to dispose of the property and effects of the Northern Pacific Railroad Company, realized that thy must in some way obtain the consent of Congress, before they could legally take action, when, however, that consent could not be had, they proceeded on the theory that title to this property would pass without the assent of Congress. The change in he name of the Superior & St. Croix Railroad Company to that of the Northern Pacific Railway Co., and the purchase of the property, real and personal, of the Northern Pacific Railroad Company, had, they believed, the effect to create that company the successor of the Northern Pacific Railroad Company whether Congress was disposed to consent to the change or not.

If the Northern Pacific Railway Company is the successor of the Northern Pacific Railroad Company, then that company must be the predecessor of the Northern Pacific Railway Company. This we know is not the fact, the Northern Pacific Railroad Company exists today. Congress could add to, alter, amend or repeal the act of

1864, if it should repeal it, the lands granted to the company and still undisposed of would return to the public domain. With such authority still existing, which we all must admit, how can the Northern Pacific Railway Company be the successor of a living corporation.

The defendants rely upon a decision of the Secretary of the Interior (29 L. D. 316) in a case of the Northern Pacific Ry. Co., under the act of July 1, 1898, which holds that upon the examination of copies of certain deeds, it is found that the Northern Pacific Railway Co. is the successor of the Northern Pacific Railroad Co. and that finding the defendants claim is conclusive; that the Secretary found from this evidnce that the Northern Pacific Railway Company was the successor of the Northern Pacific Railroad Co. is no more astonishing than the assertion on the part of the defendants that such finding is conclusive. The law which the Secretary was in that case construing, has an express provision with reference to this matter of succession. It was a legal question, not a matter of fact that had to be decided. The act of July 1, 1898, provides:

> "That nothing herein contained shall be construed as intended, or having the effect, to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company, in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company, in the courts of the United States, BUT THE LEGAL QUESTION whether the said Northern Pacific Railway Co. is such lawful successor of the said Northern Pacific Railroad Company, should be the question raised, shall be determined wholly without reference to the provisions of this act."

We raise the question of successorship here, are we bound by the decision of the Secretary, as contended by the defendants the proposition is absurd.

The Northern Pacific Railway Co., in compliance with th laws of Wisconsin, under which it was organized, made its first report to the Railroad Commissioner of that state for 10 months ending June 30, 1897. This report was sworn to by the President and Treasurer of said company, as bein a complete and correct statement, the same was filed in the office of said commissioner, a copy of which is in evidence in this case.

To certain questions asked, the following answers were given:

1st.—Name of common carrier making this report? Answer—Northern Pacific Railway Company.

2d.—Date of organization? Answer—1870.

3d.—Under laws of what Government, State or Territory organized? If more than one, name all; give reference to each statute, and all amendments thereof? Answer—Wisconsin; special act approved March 15, 1870; amended January 20, 1871, March 6, 1871, and April 15, 1895; former title Superior & St. Croix Railroad Company, changed to present name by resolution of stockholders and directors in July, 1896.

4th.—If a consolidated company, name the constituent companies? Give reference to charter of each and all amendments of same? Answer—Not a consolidated company.

Without the power conferred by the Joint Resolution of May 31, 1870, the Northern Pacific Railroad Company, wauid have had no authority to issue its bonds and secure the payment of the same by a mortgage "on its

property and rights of property of all descriptions, real, personal, and mixed, including its franchise as a corporation." Did those words confer power to convey to its bondholders by way of mortgage, and on foreclosure to transfer to the purchaser an absolute title to all the property of the company, also its franchises, including the franchise of becoming and being a corporation, so that the purchaser would have the right to organize as such successor to and substitute for the Northern Pacific Railroad Company, precisely as if the act of July 2, 1864, had named them as corporators, and endowed them with corporate faculty. If so, it would involve an assumption of the Northern Pacific Railroad Company's obligations as well as an acquisition of its privileges and exemptions. The franchise of being a corporation can not be transferred by any corporate body of its own will, as it is not a subject of sale and transfer.

In the case of Memphis, etc., R. R. Co. v. Berry, 112 U. S. (l. ed.) 840, in which questions of similar character arose, the court said:

> "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquired the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficiial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators; while the power and privileges, vested in and to be exercised

by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises. If, in the present instance, we suppose that a mortgage and sale of the charter of the railroad company created a new corporation, what has become of the old one? If it abides for the purpose of responding to the obligations not satisfied by the sale, or of owning property not covered by the mortgage or embraced in the sale, as it may well do, and as it must if such debts or property exist, then there will be two corporations co-existing under the same charter. For after an act of disposition which separates the franchise to maintain a railroad and make profit from its use, from the franchise of being a corporation, though a judgment of dissolution may be authorized, yet, until there be such judgment the rights of the corporators and of third persons may require that the corporation be considered as still existing."

The corporation created by the act of July 2, 1864, has never been dissolved and, for all purposes not covered by the mortgage, still maintains an existence as a corporate body, capable of contracting, and of suing and being sued. If this be so, how can the Northern Pacific Railway Company be its successor.

The powers of corporations organized under legislative statutes, are such and such only as those statutes confer. The charter is the measure of its powers, and the enumeration of these powers implies the exclusion of all others. In the construction of such a statute every presumption is against it.

Referring again to Sec. 10 of the act of July 2, 1864, we find this provision, "No mortgage or construction bonds, shall ever be issued by said company on said road; nor mortgage, or lien made in any way, except by the consent of the Congress of the United States." In the Joint Resolution of May 31, 1870, authorized the company to "issue its bonds to aid in the construction and equipment of its road and to secure the same by mortgage."

The prohibition with respect to "liens made in any way" was still retained. Congress never consented that liens other than mortgage liens should ever be placed upon the property. In Thomas v. West Jersey R. R. Co., 101 U. S. (1. ed.) 950, the court declared the general principle on this subject to be:

> "That where a corporation like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, WITHOUT THE CONSENT OF THE STATE, to transfer to others the rights and powers conferred by the charter, and relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."

In York v. Winans, 58 U. S. (1. ed.) 27, in reply to the argument made by the appellant, that the duties imposed upon it by the charter, are fulfilled by the construction of the road, and that by the alienation of its rights to use, and its powers to control and supervise it, they would avoid further responsibility, the court said:

"But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation can not absolve itself from the performance of its obligations WITHOUT THE CONSENT OF THE LEGISLATURE."

It is not claimed that Congress ever gave its consent that the lands within the Northern Pacific Railroad Company's grant lying east of the Missouri River, might be sold to satisfy liens by way of judgments against the company. To hold that such sale can be made without the consent of Congress, and by such sale pass a legal title to the purchaser, is to hold that any act done without authority, makes all its parts valid and the more it is done when forbidden by law the stronger the claim to its enforcements in the courts.

It may be well to note in passing, that the plaintiff claims, that the power to mortgage conferred upon the the company by the Joint Resolution, was exhausted when the first mortgage was given, which was in 1870, when the work of construction was begun. This mortgage was paid. The road was built through Minnesota long before the other mortgages were given, and therefore could not have been executed to secure the payment of bonds issued for the construction and equipment of that portion of the road. Although the lands east of the Missouri River were not affected by or sold on the

foreclosure of any mortgage, the order of sequestration prohibited the Northern Pacific Railroad Company "from issuing any mortgage or construction bonds on said road, or lien made in any way, except by the consent of the Congress of the United States."

On May 31, 1870, congress passed a joint resolution, which provided among other things:

> "That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and description real, personal, and mixed, including its franchise as a corporation. * * * And if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity, or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof to the highest and best bidder."

The land in controversy was not affected by a sale under any mortgage but on an order of sequestration. The joint resolution had only reference to a mortgage, the consent of Congress required to be given by Section 10 of the act of July 2, 1864, referred only to a mortgage, but not to "liens made in any way" by the company upon its property. Congress had a right to make this condition, and the acceptance of this provision by the Northern Pacific Railroad Co. made it effective and

binding upon it. This land was sold on a lien created by the court, without the consent of Congress, and the sale of the land did not affect the title to the same. This land was within the second indemnity limits and at the date of the pretended sale the title to the same was in the United States. The order of sale attempts to carry out the mode and manner of sale as if the lands had been patented to the Northern Pacific Railroad Company, or had been selected by that company and the selections approved by the Secretary of the Interior, but when it came to the sale of lands the selection of which had not been approved, the sale was made in gross, not by sections or sub-divisions of sections. It was simply the sale of lands, the legal and equitable title of which was then in the United States. No title could pass to such lands, whatever their situation might be in the future. There was an entire want of authority to dispose of these lands in the manner in which they were sold, and therefore no title passed by such sale. The purpose of this provision in Sec. 19 of the act of July 2, 1864, was at all times to keep the granted lands free from liens for the benefit of the stockholders of the company, and place the land grant beyond the reach of those that might at times have charge of its affairs, and be inclined to exploit the same for their own selfish interest. If the grant was beyond the reach of those that were connected with the management of the Northern Pacific Railroad Co., if the company were prohibited from creating a legal liability in the shape of a lien, it is not clear how such a lien could be made effective by an order of the court in a suit in which neither the United States, nor the stockholders of the company were parties. This provision is the same as if Congress had stated that the land embraced in this grant were exempt from sale under execution or decree. The United States as well as the stock-

holders are directly interested in the enforcement of this provision.

On April 27, 1899, there was a decree of the court made and entered in the cause in which the Farmers' Loan & Trust Company were complainant and the Northern Pacific Railroad Company and others were defendants, (Record page 145), in which the prayer of the petitioners being granted it was ordered that all the lands granted by Congress to aid in the construction and equipment of the Northern Pacific Railroad Company, and all the rights of said defendant under the several land grants made to it by Congress in any lands lying within the State of Minnesota, should be sold, the lands to be sold were the lands for which letters patent have been issued to the said Northern Pacific Railroad Company and the right to receive lands for which patents have not issued but which have been selected by and certified to said company these should be sold in single sections or subdivisions.

This decree was vacated by a decree May 25, 1899, (Record page 149), and on that date another decree was made and entered, insofar as the manner and mode of selling these lands were considered it was in the same manner as the decree of April 27, 1899 The special master who disposed of this land under the decree of the court dated May 25, 1899, made his report of his doings (Record page 159) and the manner and mode in which the sale was made, and refers to A. 2, which appears in the record of the case (Record page 163) which the special master states the lands sold in schedule A 2, were offered for sale and sold in single sections or subdivisions thereof. On September 16, 1899, it appearing to the court from the report of the special master "that he had fully complied with the directions in said decree as to the sale of said lands," the sale was confirmed.

April 27, 1899. Decree, Record p. 216):

> "All of said lands for which letters patent have been issued to said defendant, the Northern Pacific Railroad Company, and the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said company, shall be sold in single sections or subdivisions thereof at the following places."

May 25, 1898, record 223, another decree was entered upon which the sale of this property was made, states the manner in which this property was to be sold.

The order is the same as in the decree of April 27, 1899.

August 24, 1899, record 233-237, report of special master to the court, on page 237 of the record he says, speaking of the lands sold in St. Louis County:

> "Then and there, pursuant to said decrees offered at public sale the lands described in Schedule A2 hereunto annexed and made a part hereof, except those represented by "item number 390" in said schedule which said offers of said lands were in single sections or subdivisions thereof as represented by each item number.

It is claimed by the complainant that the sale of this land under the decree of the court was void.

It appears in evidence from the report of the special master that his authority to dispose of this land was conferred upon him by a decree of the court, which required the special master to sell these lands at public auction, and what lands were to be sold and the manner in which they should be sold was specifically mentioned in said decree.

He was to offer for sale:

1st. All of the said lands for which letters patent have issued to said defendant, Northern Pacific Railroad Company.

2d. And the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said company.

These two classes of land were to be sold in single sections or subdivisions.

This was the authority conferred upon the special master and the validity of his sale depended upon his conforming thereto.

The only lands that he was authorized to sell, which was included in these two classes, were lands that had been patented to the Northern Pacific Railroad, and lands that had been selected by said company, and its selections had been approved by the Secretary of the Interior.

He was not authorized to sell any lands that were not thus situated.

He was, however, authorized to sell all other lands in which the Northern Pacific Railroad Company claimed an interest, which would embrace lands not included within the two classes of land above referred to and that have not been patented to the railroad company, or its selections had not been approved and certified to the company.

All lands thus situated were to be placed in a separate class and sold in a different manner, to-wit, in a lump.

The sale of these lands was made, according to the report of the special master, on the 17th day of July 1899, and his report to the court of his proceeding under said decree, and his manner of executing the same, was made Aug. 24, 1899. In said report he says:

"That I attended at the time and place of sale within said County of St. Louis, specified in said notice, to-wit, on the 17th day of July, 1899, at 4 o'clock p. m., at the Court House in Duluth, St. Louis County, in said State of Minnesota, and then and there, pursuant to said decree, offered at public sale the lands described in Schedule A2, hereunto annexed and made a part hereof, excepting those represented by 'Item number' 390, in said schedule, which said offer of said lands were in single sections or subdivisions thereof as represented by said 'Item number' in said schedule except said number 390."

As the report does not describe the lands sold, but refers to Schedule A2, that schedule or what is claimed by the defendants to be a copy is offered in evidence and made defendants Exhibit 10, (record pp. 163-175) from which it appears that this land in controversy is therein designated as "Item number 151" (Record 168), and was sold as land that had either been patented to the Northern Pacific Railroad Company, or selected by and certified to said company.

This land did not belong to either of these two classes, and for that reason the special master had no authority to sell the same under the decree.

From this it would appear that this land was not of the character that the special master was authorized to sell in the manner which he did do, the decree conferred upon him his only authority, he had no right to dispose of this land otherwise.

As said in Williamson v. Berry, 8 Howard (1. ed.) 1171:

"In any sale under a decree or order in chancery, the purchaser, before he pays his money must

> not only satisfy himself that the title to the property is good, but he must take care that the sale has been made according to the decree or order. If he takes under an imperfect sale, he must abide the consequences."

In Milwaukee & Minnesota R. R. Co. v. Soutter, 69 U. S. (1. ed.) 886-898, Mr. Justice Miller speaking for the Court said:

> It is too clear for argument that a sale by the marshal unauthorized by the decree, is without validity. Does the order confirming the sale make it valid? Upon principle, the question is by no means free from difficulty, we are clear that a sale without a decree to sustain it would be a nullity, and we doubt if the court can make it valid by a mere general order of confirmation."

In Gray v. Brignardello, 68 U. S. (1. ed.) 693-698, the court said:

> "Purchasers at a judicial sale are protected. when the power to make the sale is expressly given, not otherwise. It is only when they buy on the faith of an order of the court which clearly authorizes the act to be done, that the shield of the law is thrown around them. An officer of the court may erroneously suppose that the power to sell is given by a decree; yet, if he does sell, his act is without authority of law and is void."

When a decree specifies the manner in which it must be exercised, it must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its

exercise. There can not in this case be any presumptions indulged in to sustain the action of the special master and uphold this sale, for he recites in his report the manner in which he sold the property, and from the recitals it appears that he disregarded the order or decree of the court and did not conform to its directions. That presumptions are not indulged to sustain proceedings of this character are made manifest. Presumptions are indulged to supply the place of that which is not apparent, not to give a new character to that which is seen to be defective, every deed executed under a power must refer to the power. As an independent instrument of the holder of the power it would not convey the interest intended, but if the manner in which the power is exercised is recited, it being proper matter for recital, then the recital is evidence not against a stranger, but against the grantee and parties claiming under him. French v. Edward 20 U. S. (1. ed.) 702.

The special master recited in his report the manner in which he had exercised the power conferred upon him by the order or decree, making part of his report schedule A2, and referring to the lands he had sold by items, mentioned in said schedule, among which we find the land in controversy; the Northern Pacific Railway Company, by accepting the conveyance with this solemn declaration of the officer as to the manner in which his power was exercised, would be estopped from denying that the fact was as recited.

If while acting under a valid decree, an officer sells lands not embraced therein, his act is, as to such lands, obviously without any legal support.

Ludlow v. Park, 4 Ohio 5.

Green v. Holt, 76 Mo. 677.

In conducting the sale, the master acts as the agent of the law, his powers as such being derived from the decree, and the order or decree must be strictly pursued. The purchaser is bound by the presumption to know the limits of the master's authority as delegated to him by the decree, and purchasing when he transgressed such special authority, he does so at his peril. This is in accordance with the general principles applicable to the law of agency.

Manifestly when the decree requires that the master make the sale under the order of the court he is imperatively controlled by the requirements thereof, and a sale made in controvention of the decree is ineffectual to bar the title from the judgment debtor to the ostensible purchaser.

Sec. 310 Klebers void Judicial Sales.

Accordingly, in theory of law in a strictly judicial sale the court itself is properly the vendor, and the sale, insofar as the owner of the property is concerned is an involuntary one. Sec. 2.

From its very nature, a judicial sale is of necessity the result of judicial proceedings, and the order or decree upon which the sale is founded, must expressly direct that the property involved, whether real or personal, be sold, for without such an order there can be no judicial sale within the strict meaning of the term. Sec. 3.

A sheriff, master or other officer, selling property under a process, decree or judgment of the court cannot make a valid agreement with the purchaser to convey any other estate than such as the decree or judgment will warrant.

Ryan v. Dox, 25 Barb. 440.

A sale of land under judgment must be made in the manner prescribed in the judgment.

Bethel v. Bethel, 69 Ky. (6 Brush 65-99).

American Dec. 655.

A sale of property in any other manner than that prescribed by law vests no title in the vendee.

Gable v. Martin, 2 Mass (1 Howard) 558.

But we do not mean to intimate that in any case a sale by master, or master in chancery, can be valid, when there is no decree to support it, citing Shriver v. Lynn, 2 Howard 43.

Milwaukee and Minn. R. R. v. Soutter, 69 U. S. 898.

THE NORTHERN PACIFIC RAILWAY COMPANY, WAS NOT AUTHORIZED BY ITS CHARTER TO PURCHASE, HOLD OR CONVEY THESE LANDS.

The rights of the Northern Pacific Railway Company were conferred upon it by an act of the state of Wisconsin dated March 15, 1870, by which was incorporated the Superior and St. Croix Railroad Company. This act was in effect the same as the one under consideration in the case of Case v. Kelly, 133 U. S. (1. ed.) 513, in which it was held that a railroad had no authority to deal in any lands, except only such as was necessary in the conduct of its business as a railroad. The decision in that case, would be the law in this, provided the

amendments to the articles of incorporation of the Superior & S. Croix Railroad Company, adopted by the Legislature of the State of Wisconsin, April 15, 1895, were void under the constitution of that state, and the complainant was authorized to raise that objection. The act with the amendments are given in full. (See exhibit "D" attached to the bill of complaint.)

It is claimed that Section 8, as amended under which the authority is conferred is void, as controvening not only Section 18 of Article 4, of the constitution of the State of Wisconsin, but of Section 31 of Article 4 of the same instrument.

Section 18, Art. 4, of the constitution, is as follows:

> "No private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in the title."

The title of the Act was "To incorporate the Superior and St. Croix Railroad Company." The title of the act as amended April 15, 1895, is:

> To amend Chapter 326 of the private and local laws of 1870, entitled "An Act to incorporate the Superior & St. Croix Railroad Company," and Chapter 328, of the private and local laws of 1871, entitled "An Act to incorporate the Superior & St. Croix Railroad Company."

The title was plain and simple, "To incorporate the Superior and St. Croix Railroad Company." Anything that was germane to this title was authorized under it. The original charter of the Superior & St. Croix Railroad Company was for the construction of a railroad entirely within the State of Wisconsin, and it was author-

ized to acquire real estate for its right-of-way and for lands that were necessary for its use as such railroad. By section8 as amended, the company was authoribed to hold and dispose of any lands that the Superior & St. Croix Railroad Company might acquire, by its purchase or otherwise, in any territory, through or in which it shall acquire in any manner, and operate any railroad or railroads wherever such lands may be situated. By this amendment the act has two subjects. First, to incorporate the Superior & St. Croix Railroad Company; Second, to buy, sell, or otherwise dispose of, lands within any state through which it may operate any railroad. These two subjects have no connection with each other.

Would we reasonably anticipate finding in the body of an act, the title of which was to incorporate the Superior & St. Croix Railroad Co., a clause giving authority to said corporation to purchase, hold or dispose of lands without limit? Is such a provision germaine to such a title? The construction of a railroad and the purchasing and disposing of lands have no rational connection with each other. The only subject mentioned in the title is the incorporation of the Superior & St. Croix Railroad Company. Such an act might contain any provision necessary to carry out that purpose. An act to incorporate the Superior & St. Croix Railroad Company, would apprise neither the Legislature nor the public, that it covered provisions under which an unlimited amount of lands could be purchased by that corporation. The reading of such a title would at once induce the conclusion that the various provisions of the act related alone to the inporation of said railroad, and the act itself must, therefore be confined to that subject. The constitutional provision is violated if an act is amended so as to embrace a purpose outside of its title. Whatever amendments

are made must be amendments to the organic law, and not independent provisions relating to something else. The constitution has made the title, the index to the legislative intent, as to what shall have operation. The purpose of the adoption of such provision in the constitution of the state was that every measure presented for consideration should stand upon its own merits, and that the legislature should be fairly notified of the design of the act when required to pass upon it. Has the added provision any necessary connnection with the subject stated in the title, or any connection with the subject treated in the act? By no reasonable construction in the purpose of buying and selling lands can be said to be embraced within the title to incorporate the Superior & St. Croix Railroad Company. The section of the constitution prohibiting legislation of this character is a wise and wholesome one, intended to prevent legislators from being entrapped into a careless passage of sections and clauses in bills of which the title gives no intimation. The propriety of such an inhibition is apparent to all, and it must be observed and protected by the courts. Titles to legislative acts by reason of these constitutional provisions possess very great importance. It not only requires that the purpose of the law should be correctly indicated, but it absolutely makes the title of the act control, and excludes everything from the effect and operation as law which is incorporated in the body of the act but is not within the purpose indicated by the title.

Is it probable that the Legislature of Wisconsin, having under consideration the amendments to incorporate the Superior & St. Croix Railroad Company, if it had supposed or been informed that by the adoption of said amendments it was clothing said railroad company with the power to deal in lands, not necessary for its

use, that it was conferring upon it a power without limitation, that such provisions would have become a law. The title is not broad but narrow, not general but specific. Under such a title no one would infer, and nobody was bound to imagine that such vast powers had been conferred upon this corporation to deal in lands in the manner claimed by said company, a provision as to which the title not only did not relate, but by its narrow terms affirmatively, and positively excluded.

Milwaukee Co. v. Isenrig, 109 Wis. 19.

Diana Shooting Club v. Lamoreoux, 114, Wis. 44.

Section 31, Article 4 of the constitution of the State of Wisconsin is as follows:

> "The Legislature is prohibited from enacting any special or private laws in the following cases: First, For changing the name of persons, or constituting one person the heir at law of another; Second, For laying out, opening or altering highways, except in cases of state roads extending into more than one county, and military roads, to aid in the construction of which lands may be granted by Congress; Third, For authorizing persons to keep ferries across streams, at points wholly within this state; Fourth, For authorizing the sale or mortgage of real or personal property of minors, or others under disability; Fifth, For locating or changing any county seat; Sixth, For assessment or collection of taxes, or for extending the time for the collection thereof; Seventh, For granting corporate powers or privileges, except to cities; Eighth, For authorizing the apportionment of any part of the school fund; Ninth, For incorporating any town or village, or to amend the charter thereof."

It is contended by the complainant, that under the seventh subdivision of Section 31 the amendments to the charter incorporating the Superior & St. Croix Railroad Company, adopted by the Legislature on April 15, 1895, are void. It can not be denied that these amendments grant corporate power as well as privileges, and that to a very remarkable extent. The original act of March 15, 1870, contained 22 sections. Of these 12 sections were amended, 7 repealed and 6 new sections added. Under the guise of amendments a new act to incorporate this company was made. New powers, and new privileges were conferred upon it, and these of a very extraordinary character. The act under consideration not only authorized and empowered the "Superior & St. Croix Railroad Company" to construct a railroad within the boundary of the state of Wisconsin, but to extend the construction of said railroad into the several states, and into the Dominion of Canada. It could not only build a railroad, but it was authorized to purchase any railroad, or railroads, to buy stock and bonds of any railroad. It may become a dealer in lands, buy and sell the same in the states through which its railroad may pass, and all these powers are conferred upon it, under the act, the title to which is to incorporate the "Superior & St. Croix Railroad Company." That there was no intention by these amendments to carry out the original purpose of the act is apparent by the subsequent action of this company. From March 15, 1870, to July 6, 1896, the Superior & St. Croix Railroad Company, if it had any existence at all, such existence was on paper alone. Not a mile of this road had been constructed, there had been no money raised or effort made towards the construction of this road. The incorporation of the Superior & St. Croix Railroad Company up to July 6, 1896, was only a float, and its only market value was the use it was

put to on that date by changing its name to the Northern Pacific Railway Company, and within six months after this transformation, it was the owner of more than 5,000 miles of tract, and millions of acres of land, with stock and bonds issued by it of more than $300,000,000 without a mile of the road constructed on the line designated in the original act, and all this vast property held under an act to incorporate the Superior & St. Croix Railroad Company. It seems to me that if the amendments to this act adopted April 15, 1895, conferred the powers and privileges clearly fall within the condemnation of the Seventh clause of Sec. 31, Art. 4, of the Constitution of the State of Wisconsin, and are therefore void.

In the case of Attorney General v. Superior & St. Croix Railroad Company, 93 Wis. 613, the court in speaking of the amendments to the Articles of Incorporation of this company, said:

> "Whether the provisions of Ch. 244, Laws of 1895, which greatly enlarge the existing rights, privileges and franchises of the company, and confer upon it others of a varied and most comprehensive and highly important character, are void, as being in violation of the 7th clause of the constitutional amendment of 1871, (Art. 4, Sec. 31), forbidding the enactment of "any special or private laws for granting corporate powers or privileges, except to cities," is not presented by the information, so as to become a proper subject for judicial determination and we neither express nor intimate any opinion in respect to these portions of the act."

The matter before the court was a motion by the Attorney General for leave to file an information in the nature of a quo warranto, the court, however, was of the opinion that so far as the question presented, that the

amendments were in conflict with the provision of the constitution referred to, the evidence did not show that the company had acted upon them, but in the case now before the court, those facts are made to appear, by the purchase of the land in controversy by this company and the sale of the same to the defendants in this case. If the act as amended authorized the Northern Pacific Railway Company to purchase and dispose of lands acquired, it still remains simply a law of the State of Wisconsin. It has no force or effect in the State of Minnesota.

A corporation is not a citizen (only in a qualified sense) of the state in which it is created. It can only act in another state on such conditions as the latter state may see fit to impose. Corporate existence is by universal law regarded as a franchise which can never exist except by positive authority within the state which granted or confirmed its franchise. The strictly legal existence by force of obligatory law of a corporation is confined to the state which created it, and endowed it with its powers, capacities and rights, which it can only exercise in another state by the permission of the legislative power thereof, and when it assumes to act in such state, the enjoyment, and exercise of such right must conform to the law or settled policy of that state not prejudicedial to its interest, or those of its citizens. The power to take land in a corporate capacity is itself a franchise, the title passes by succession, the changes by death or otherwise among the corporators does not affect its disposition, as it does in private holdings.

The question whether a railroad company organized under the laws of Wisconsin is competent to take title to lands in the State of Minnesota, does not wholly depend upon the laws of its creation; the laws and public policy of the State of Minnesota, as indicated by its legislature,

are material, and important factors to be considered. The Northern Pacific Railway Company owes its existence to the laws of the State of Wisconsin, and the powers and capacities expressed or implied, are such as conferred upon it by its charter. The question therefore is, First, Whether the Northern Pacific Railway Company was clothed with authority to purchase these lands within the State of Minnesota, and, if so, Second, whether the laws or settled policy of Minnesota allowed such purchase. The laws of the State of Minnesota prohibit corporations from holding lands except to a limited extent, Section 5877, Gen'l Stat. 1894, as amended by Ch. 129, Laws of 1899, provides:

> "That no corporation other than those organized for the construction or operation of railroads, canals or turnpikes, shall acquire, hold or own over 5,000 acres of land so hereafter acquired in this state; and no railroad, canal or turnpike corporation shall hereafter acquire, hold or own land so hereafter acquired in this state other than may be necessary for the proper operation of its railroad, canal or turnpike, except such lands as may have been granted to it by act of Congress, or the Legislature of this state."

This statute indicates the policy of the state in this regard. Whatever may have been the capacity of the Northern Pacific Railway Company to take, hold and convey lands within the State of Wisconsin, the laws of Minnesota forbid that company, and all other corporations, to take, hold or convey lands in the State of Minnesota, except such as may be necessary for the proper operation of its road. The complainant, therefore, contends that the title to this land in controversy did not pass to the Northern Pacific Railway Company, and that

such road could not transfer any valid title to the same to the defendants.

It may be urged that the limitation upon the power of a corporation to receive land is one which concerns the state alone, that the title to such lands in a corporation can only be defeated by a proceeding in the nature of a quo warranto on behalf of the state.

The rule universally applied in determining the effect of conveyances is, that if the thing granted was not in the grantor at the time of the grant, no estate passes to the grantee. A patent is but evidence of the grant, and the officer who issues it acts ministerially, and not judicially; if he had no authority to grant it, or another party had a higher equity, and should have received the patent courts in a proper action will pronounce it void. A court might hesitate to declare the title to land already received and in the possession of the defendant void, for the reason that their grantors had no authority to purchase such land, and were forbidden to do so by their charter, but if the title conveyed to their grantor was absolutely void, for want of authority to grant it, or their grantor to receive it, the title would be held void even in a court of law.

In reference to the patenting of these lands to the Northern Pacific Railway Company, the question is not that of "ultra viras," but of the power and authority of the government to convey, and the railroad company to receive. I contend that there was wanting in this case both a grantor and a grantee. Where the officer has no authority in law to grant, such grant is void, for a public officer can bind the government only within the scope of his lawful authority. (U. S. v. Stone, 69 U. S. 765). If the officer has authority to grant but the grantee has no

authority to receive, the grant is void for the same reason. It is not a question of "ultra vires" for that can only occur where the grantee has exceeded its powers, but here is an entire want of power to receive the grant. In such cases the grant is held absoluately void, not voidable.

The existence of a grantee authorized to take the grant is absolutely essential to every grant, and the grant to a fictitious person or corporation is a mere nullity, and can in no manner affect the title of the lands purporting to be granted.

Thomas vs. Wyatt, 31 Mo. 188;

Douthett vs. Stinson, 63 Mo. 268;

U. S. vs. S. C. C. & T. Co., 18 Fed. Rep. 273-276;

Russell vs. Topping, 5 McLean, 194-202;

Harriman vs. Loutham, 10 Ind. 190;

Devlin on Deeds, Sec. 191.

It is settled that where it is doubtful whether a corporation has exceeded its powers or abused its corporate franchise in the acquisition of title to land, strangers cannot litigate the question, at least after the title has vested. The question then is one between the state and the corporation.

But while this is true, it is equally well settled that where the acquisition is prohibited, a grant to such corporation would be absolutely void and would not pass the title.

Russell vs. Topping, 5 McLean, 194;

Harriman vs. Southam, 16 Ind. 190;

Chatauqua County Bank vs. Risley, 14 Denio, 480;

Michigan Bank vs. Niles, 1 Doug. 401;

People vs. Bank of Oakland Co., 4 Denio 280.

The question presented is not one of doubt as to whether or not it has exceeded its powers or abused its corporate franchise.

It is not therefore to be governed by those decisions where the question of the right of the corporation to take lands is a question of doubt which the corporation has a right to have passed upon by the Courts.

THE CASE OF SJOLI v. DRESCHEL.

The Northern Pacific Railroad Co. has no vested right until after the approval of the Secretary. It has only the right of selection and having no other right is bound to exercise that right with reasonable diligence. In Sjoli vs. Dreschel, 199 U. S. (L. E.), 564 The Court said:

> "No right to lands within Indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior, that up to the time such approval is given lands within indemnity limits although embraced by the Company's list of selections are

subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws of the United States; and that the Secretary has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road. * * * The result of the cases in this court is that the railroad company did not acquire an interest in any particular lands within the indemnity limits merely by filing its lists of selection, nor until its selections were approved by the Secretary of the Interior, * * * The mere filing of its lists of selections of indemnity lands did not have the effect to exclude them from occupancy under the pre-emption or homestead laws. On the contrary, notwithstanding the filing of such lists they remained open, as before, to settlement or occupancy under those laws, until the selections were formerly approved by the Secretary of the Interior, and the lands withdrawn from settlement or sale.."

In the case of Ryan v. Central Pacific R. R. Co., 99 U. S. 305 (1. ed.) Mr. Justice Swayne, speaking for the court, says:

> With respect to the lieu lands, as they are called, the right (of selections) was only a float, and attached to no specific tract until the selection was actually made in the maner prescribed by law.

What did the law prescribe? That the selections should be approved by the Secretary of the Interior, until that time the right to select was only a float, that might be settled on any land within the indemnity limits. This was the only construction which would preserve a wise control in the government over the public lands and

prevent spoliation of them under the pretense of selection. The railroad company being under no obligation to finally take the land it had by its preliminary selection selected but it could at any time before such selection was approved relinquish its preliminary selection and take other land; an other reason why the land must be identified, and it could not be identified until the tract was known, and selection made and approved.

In St. Paul & Sioux City R. R. Co. v. Winona, etc., 112 U. S. 872-876. (1. ed.) Mr. Justice Miller speaking for the court says:

> Until a valid selection by the grantee is made from the lands within the indemnity limits, they are entirely open to disposition by the United States, or to appropriation under the laws of the United States for the disposition of the public lands.

In Wisconsin Central R. R. Co. v. Price County, 133 U. S. 687-694, (1. ed.) Mr. Justice Field, speaking for the court says:

> Until selections were approved *there were no selections in fact*, only preliminary proceedings taken for that purpose; and the indemnity lands remained uneffected in their title, until then the land which might be taken as indemnity, were incapable of identification; the proposed selections, (that is the list) remains the property of the United States.

In New Orleans R. R. Co. v. Parker, 143 U. S. 66, (1. ed.) Mr. Justice Brown, speaking for the court, says:

> As to lands within the indemnity limits, *it has always been held* that no title is acquired until the specific parcels have been selected by the grantee, *and approved* by the Secretary of the Interior.

In Humbird v. Avery, 195 U. S. 286-298, (1. ed.) Mr. Justice Harlan in speaking for the court said:

> That no title to indemnity lands is vested until a selection is made by which they are definitely ascertained, and the selection made *approved by the Secretary of the Interior.* This principle, (says the court) is firmly established.

If the railroad company by its preliminary selection of this land, October 17, 1883, (27 years ago) had a right to the same. If at any time thereafter the government, if so disposed, could have conveyed the land or reserved the same; if the railroad company could at any time during these 27 years have relinquished its claim, and selected other land, what interest could the railroad company have had in land thus situated. The proposition that it was within the authority of any officer of the land department, having no regard to what had taken place between 1883 and the present time, by his approval of the selection made by the railroad company in 1883 to clothe such selection in such a manner as to make a valid title that would relate back to the date of the filing of the preliminary selection and cut off intervening claims, is too absurd to notice.

The only question to be determined is at what time did the railroad company obtain any right whatever, by its selection of this land; was it at the date of filing of its preliminary selection, or at the time of the approval of such selections by the Secretary of the Interior. It must be one or the other for no claim is made by the railroad company that its right to this land accrued at any other period.

That question I think was answered by the court in Sjoli v. Dreschel, 199 U. S. 311 (1. ed.). The facts in that case were as follows: Sjoli entered upon the land

with his family, October 4, 1884, and since that time continuously resided thereon. The land was within the first indemnity limits of the grant to the Northern Pacific Railroad Company. The map of the general route of said railroad was filed in the office of the Commissioner of the General Land office Aug. 13, 1870, (See map in brief. p. 102), the line of general route, and the subsequent map of definite location filed Dec. 26, 1871, were coterminous; at the same time the Commissioner withdrew the odd numbered sections within the first and second indemnity limits of the grant. At the date of the filing of the maps of the general route and definite location of the road, and the withdrawal of land within the first and second indemnity from sale or other disposition, the land was public land subject to selection by the railroad company. At the time Sjoli took possession of the land the United States land office was established and had been doing business for many years prior to that time, but Sjoli made no application for the land as the law required, (Maddox v. Burnham, 156 U. S. 1. ed. 527), the law is firmly settled that one whose claim to public land depends on possession alone has no title to the same, without regard to the length of time he may have been in possession, or the value of improvements he may have placed thereon, in order to make his possession of any effect he must apply to enter the land, under one of the land laws of the United States, I do not think there can be any question about this proposition. While Sjoli was in possession of the land the Northern Pacific Railroad Company in 1885, made and filed its list of selections which included the land occupied by Sjoli. In 1889, five years after his taking possession of the land and four years after it had been selected by the railroad company, Sjoli applied to make entry of this land under the homestead law. His application was rejected because the

local officers erroneously supposed the land to be within the granted limits of the St. Paul, Minneapolis & Manitoba Railroad grant. No appeal was taken from that order. He continued to reside on the land and in 1895, again applied at the proper land office to enter the land under the homestead law. At that time he had been in occupation of said land 11 years with no other title to the same except his possession. His application to enter was allowed, his proof accepted and on June 18, 1901, a patent for the land was issued to him. Can the defendant explain, under their theory of selection in connection with the facts above stated, why the court adjudged the title to this land in Sjoli. He had not applied to enter the land, until after the company had filed its list of selections, his possession of the land at the time of the selection, gave him no title, if the theory of the defendants is correct, that by the selection of this land in 1885, it gave to the company a right to this land, what became of such right. If it had a right, legal or equitable, at the date of the preliminary selection in 1885, that right must exist today. I think it plain from the decision of the Sjoli case that the supreme court has declared that the date of the approval of the selection by the Secretary of the Interior, is the date when the land is selected, and not at any date prior to that time. This I contend is determined and clearly expressed in the following paragraph of the opinion of the court.

> That no rights to land within indemnity limits will attach in favor of the railroad company until after selection made by it with the approval of the Secretary of the Interior. That up to the time such approval is given, lands within indemnity limits, *although embraced by the company's* list of selection are subject to be disposed of by the United States, or to be settled upon and occupied under the

> pre-emption and homestead laws of the United States, and that the Secretary of the Interior *has no authority to withdraw from such sale or settlement lands that are within indemnity limits which have not been previously selected with his approval,* to supply deficiencies within the place limits of the company's road.

This language is broad and comprehensive. The court says that "no right to lands within the indemnity limits will attach in favor of the railroad company until after selection made by it with the approval of the Secretary of the Interior," this is a statement without any qualification. You can not say that one has no right to land, but if some time in the future he does acquire a right, that that right will date back 25 years, and cut off all intervening claims. The decision in the Sjoli case shows conclusively that the right of the railroad company to any selected lands must date from the approval of the Secretary, and not a day before such approval.

And this would be so if the preliminary selection list of the company had remained since the date of filing, October 17, 1883, undisturbed and not canceled. The last paragraph of the opinion of Mr. Justice Harlan in the Sjoli case, puts beyond question the equitable title to this land. in which the court said:

> The learned state court in not holding, (that is that the approval of the selections by the Secretary was the date of the company's selection) and adjudging that the Northern Pacific Railway Company acquired an interest in the land immediately upon filing its list of selections and that the defendant in error (that is Dreschler) was the owner of it.

Further in the case at bar, the question is not that of divesting from a corporation a vested title, but whether or not any title ever vested in the corporation.

In conclusion we ask the careful consideration of the court to the following propositions:

1st. That the Northern Pacific Railroad Company, under the proviso in Sec. 3 of the Act of July 2, 1864, was not entitled to any lands that were included within the Act of May 5, 1864, such act being prior in date to the Northern Pacific Railroad Company, and should be deducted from the amount of lands granted to said Northern Pacific Railroad Company, and charged to the same.

2d. If such should be determined by the court not to be the law, we then insist that after the definite location of the Lake Superior & Mississippi Railroad, who was the beneficiary of the grant of May 5,1864, the lands within the place and indemnity limits of the Lake Superior & Mississippi Railroad, would by relation, be considered from the date of the grant May 5, 1864, this would be prior to the date of the Northern Pacific Railroad Company's grant, and if the land claimed to have been lost by reason of its being patented for the benefit of the Lake Superior & Mississippi Railroad Company, the lieu land should have been selected within the first indemnity limits, a selection of land within the second indemnity limits should not be sustained.

3d. The land within the place limits of the Northern Pacific Railroad Company, claimed to have been lost to its grant, which was the bases of the selection of the land in controversy was on the south side of the railroad

line, while the land selected was on the north side of its line of road, such selection is void.

4th. The decree under which this land was sold dated May 25, 1899, particularly directed the manner in which the lands should be sold, to-wit: Record page 150).

> "All of the said lands for which letters patent have been issued to said defendant Northern Pacific Railroad Company, and the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said company, shall be sold in single sections, or sub-divisions thereof."

The land in controversy was not in either of these classes. It was neither patented to the Northern Pacific Railroad Co., nor selected by that company, and approved by the Secretary, for the records show, (Record p. 138) that the approval of the selection of this land was not until Oct. 12, 1905. There was no authority given by this decree ,to the special master to sell this land in the manner he did, and therefore no title to the same passed to the Northern Pacific Railway Company by reason of such sale.

5. The land in controversy was not included in the bill filed October 18, 1893, to foreclose the mortgage given by the Northern Pacific Railroad Company to the Farmers' Loan & Trust Company, nor in any of the subsequent mortgages given by that company. The bill filed August 15, 1896, was dismissed November 15, 1893, so far as it had any effect in the State of Minnesota, and which is the bases of these proceedings, gave the court no authority to make a decree for the sale of these lands for the court was without any jurisdiction.

6th. That the selection of this land as indemnity for the loss of the land within the place limits of the grant to the Northern Pacific Railroad was void, for the reason that the lieu lands was not the nearest unappropriated land to the land lost. This fact should have been shown by the Northern Pacific Railroad Co.

7th. The act of July 2, 1864, incorporating the Northern Pacific Railroad Company, did not intend to confer this grant on any other corporation hereafter to be organized, there is no evidence in the case that the Northern Pacific Railroad Company, or of any other company. The land department was without any authority to convey this land to the Northern Pacific Railway Company, neither had the Northern Pacific Railway Company under its charter any authority to receive such conveyance.

8th. The act of July 2, 1864, conferred no authority upon the Northern Pacific Railroad Company to execute a mortgage upon the lands granted, but on the contrary expressly prohibited the making of a mortgage. The joint resolution of May 31, 1870, gave consent that a mortgage might be given but that was a charter power and when once exercised it was exhausted, the subsequent mortgages given after the mortgage dated July 1, 1870, are all without authority and are illegal and void.

MEMORANDUM OF AGREEMENT, Made this sixteenth day of March. 1896, by and between

J. P. MORGAN & CO, of New York, and the DEUTSCHE BANK, of Berlin (hereinafter called the "Syndicate Managers"), of the first part; and

J. P. MORGAN & CO., as Reorganization Managers of the Northern Pacific Railroad Company (herein called the "Reorganization Managers"), of the second part; and

THE SYNDICATE SUBSCRIBERS hereto (hereinafter called the "Syndicate"), constituting the party of the third part; every such Syndicate Subscriber being bound only ratably and to the extent of his own subscription, and not for any other subscriber or subscription.

WHEREAS (pursuant to a Plan about to be issued), it is proposed to undertake a reorganization of the affairs of the Northern Pacific Railroad System on the basis of a Prior Lien Four per cent. mortgage and a General Three per cent. mortgage, involving about $6,500,000 annual fixed charges for all outstanding bonds (not including sinking-fund charges nor interest on bonds reserved for additional construction requirements. ets.), and with $75,000,000 Four per cent. non-cumulative preferred stock and $80,000,000 common stock, it being understood that new Prior Lien bonds equal at least to the par of any undisturbed existing main-line bonds are to be reserved for the ultimate redemption thereof;

AND, WHEREAS, it is proposed that to the extent and in the manner hereinafter provided the Syndicate shall provide the cash requirements of said Plan;

NOW, THEREWORE, THIS AGREEMENT WITNESSETH: That, in consideration of the mutual promises herein contain and the expected benefits from the performance thereof:

1. The Syndicate will take and pay for, and the Managers will sell and deliver, the following new securities when issued:

$7,775,000 of the new 4 per cent. Prior Lien Mortgage Bonds

1,172,880 of the new 3 per cent. General Mortgage Bonds

18,767,825 of the new Preferred Stock (Trustees' Certificates)

77,500,000 of the new Common Stock (Trustees' Certificates)

For the sum of $19,873,830 in cash, plus any interest accrued on the bonds when delivered.

2. The Syndicate, if so requested by the Reorganization Managers,will further take and pay for the following additional amounts of new securities when issued:

$3,554,960 of the new 4 per cent. Prior Lien Mortgage Bonds

$9,718,120 of the new 3 per cent. General Mortgage Bonds.

For the sum of $8,875,000 in cash, plus any interest accrued on the bonds when delivered;

or, if and as requested by the Reorganization Managers, the Syndicate will so take and pay for any part of both or either of such lots of bonds; the ratable price therefor to be fixed by the Syndicate Managers and the Reorganization Managers.

The Reorganization Managers agree to sell to the Syndicate said additional lots of bonds, if, and as the proceeds thereof shall be, required by said Managers for the purposes of the reorganization, or such part thereof as may be so required, as above provided.

3. If at any time, for purposes in their opinion calculated to promote the reorganization, the Reorganization Managers shall desire the Syndicate (a) to advance moneys upon security of certificates approved by the Syndicate Managers entitling their holders to new securities when issued, or (b) to advance moneys upon other security approved by such Syndicate Managers including coupons, lands or land notes), or (c) to purchase lands or land notes, the Syndicate Managers, will make such loans at six per cent. per annum interest, and will make such purchases up to an aggregate amount of loans and purchases not exceeding $15,000,000; but such loans upon lands or land notes or such purchases thereof shall not exceed $3,500,000 in amount. All loans hereunder shall be repaid out of the proceeds of the new securities deliverable hereunder.

4. It is distinctly understood and agreed, anything herein to the contrary notwithstanding, that the total obligations of the Syndicate under this agreement shall not exceed the sum of forty-five million dollars ($45,000,000) in cash.

5. Deliveries of new securities shall be made with reasonable promptness after completion of re-organization, in New York, London and Berlin, in such proportions as the Syndicate Managers respectively shall request. The Syndicate will perform all its undertakings hereunder from time to time on the call of the Syndicate Managers. The compensation of six and two-thirds per cent., hereinafter provided for is to be paid when and as securities are delivered, and regardless of the aggregate amount of securities delivered.

6. Not over $9,000,000 (20 per cent.) in money shall be called from the Syndicate hereunder in any one month. Payments from the Syndicate Subscribers shall be due only after ten days' written notice from the Syndicate Managers to the Syndicate Subscribers.

7. The Syndicate hereby authorizes the Reorganiza-Managers, in and by the proposed plan, to offer, for account of the Syndicate, to depositing holders of the preferred stock of the Northern Pacific Company, at $10 per share, preferred stock of the New Company to the amount of 176,192 shares and common stock of the New Company to hte amount of 176,192 shares, and offer to the depositing holders of the common stock of the Northern Pacific Company, at $15 per share, common stock of the New Company to the amount of 490,000 shares, upon the terms and in the manner provided in said plan and agreement, and the Reorganization Managers hereby agree to make such offer. All moneys paid by the depositing holders of preferred or common stock of the Northern Pacific Railroad Company under said plan and agreement shall be credited on account of the amount payable by the Syndicate under Article 1. hereof, and may be used by the Reorganization Managers for any purpose of the reorganization.

8. The Reorganization Managers shall pay to the Syndicate Managers for the benefit of the Several Syndicate Subscriber in proportion to their respective subscriptions, a commission or compensation of six and two-thrds per cent. in cash on the amount of the subscriptions hereunder regardless of the amount which the Syndicate shall be called upon to pay or advance.

9. The Plan of reorganization may be modified from time to time by the Reorganization Managers, and thereupon this agreement shall apply to such modified plan; but any amendment which the Syndicate Managers shall deem seriously to impair the value of the new securities shall have their joint written approval. The Reorganization Managers may finally abandon the Plan, including all modifications thereof, and in such event this agreement shall cease to be of any future effect, and no compensation thereunder shall be due the Syndicate.

10. The Reorganization Managers shall have and from time to time may exercise all powers as stated in the reorganization, agreement and plan, including the right, in their discretion, to fix, limit or extend the time within which any bondholder may deposit bonds, or any stockholder may purchase stock, and to waive any forfeiture in respect thereof.

11. Failure of any Syndicate Subscriber to perform any of his undertakings herunder shall not release any other Syndicate Subscriber, except with the written consent of the Syndicate Managers. The Syndicate Managers may accept new Syndicate Subscribers from time to time in place of any Subscriber released by them, or who shall fail to perform his undertakings hereunder.

12. The Syndicate Managers, in behalf of the Syndicate, may make any and all arrangements necessary or expedient to carry out the purposes of this agreement substantially as herein set forth; or to promote or protect what they deem to be the best interests of the Syndicate.

13. The Syndicate Managers may decide whether the bonds and stock, or either, deliverable hereunder

(except such stock as shall have been sold to depositing stockholders of the old Company) shall or shall not for a period not exceeding one year after delivery be held subject to the Syndicate Managers' control, i. e., "syndicated", for the purpose of sale by them for the ratable benefit of Syndicate Subscribers; and the Syndicate Managers may take all proper steps and adopt all reasonable precautions to carry such decision into effect. In case the bonds and stock be so "syndicated," the Syndicat Managers may sell the same, or any part thereof, for the benefit of the Syndicate, charging a commission of one per cent, on the proceeds thereof, in addition to all expenses by them incurred, and they may require each Syndicate Subscriber to supply his ratable share of the bonds or stock so sold (which each Syndicate Subscriber, for himself, agrees to do), receiving his ratable share of net proceeds of such sales.

14. The Syndicate Managers shall not be liable under any of the provisions of this agreement, or any matter connected therewith, and in like manner the Reorganization Managers shall not be liable under any of the provisions of this agreement or any matter connected therewith, except in each instance for good faith and th exercise of reasonable diligence. The Syndicate Managers may become Syndicate Subscribers hereto, and in that event they shall be liable for their Syndicate subscriptions in the same way as, and ratably with, other Syndicate Subscribers.

15. All notices to American members of the Syndicate shall be sufficient if signed by or for J. P. Morgan & Co. for the Syndicate Managers, and to other members if signed by or for the Deutsche Bank in like manner.

16. Each and every party hereto, upon reasonable request, will, from time to time, execute, deliver and perform all further written agreements necessary or proper to carry this agreement into effect.

17. This agreement shall bind and benefit not only all the parties herto, but their respective executors, administrators, survivors, successors and assigns.

The respective Syndicate Subscribers, on signing this agreement, shall set opposite their respective names the amount of their respective subscriptions on account of the whole Syndicate obligation hereunder; and each Subscriber shall be liable only for such ratable part of the whole obligation of the Syndicate as shall bear the same ratio to such whole obligation as the amount of his subscription bears to $45,000,000.

Nothing herein contained, or otherwise, shall constitute the Syndicate Subscribers partners, or render them liable to contribute more than such ratable amounts as aforesaid.

IN WITNESS WHEREOF, the parties hereto, being the Syndicate Managers, the Reorganization Managers and the Syndicate Subscribers, have at various dates affixed their subscriptions hereto, it being understood that, for convenience, this agreement may be signed in several parts and copies with like force and effect as if all of the signatures were put to one part or copy thereof.

I am aware that no arguments can be drawn from the wisdom that comes after the fact, but it appears to me that it would have been much more profitable to the government if it had kept the title to these lands and not

vested them in the company. If aid was deemed advisable, give such aid out of the proceeds arising from the sale of the lands, or loan to the railroad company a certain amount either of money or bonds. Land should never be allowed to be vested to any great extent, either in the hands of private parties or in those of a corporation, because it is a peculiar kind of property not only in its necessity to man, but in the power it gives to men over their fellow beings. It is peculiar also in this, that of all kinds of property known to men, it is the only one which the wit of man cannot add to, let him contrive or toil as he will. He can make land more productive, and in that way he can increase its aggregate value, but in all the surface of the globe he cannot add one foot of earth to that which lays in the beams of the morning sun that first shone upon Adam in Paradise. Money can be replaced—land cannot be increased. Land alone is that kind of property which is essential to the maintenance of that class of freeholders in this country without which there can be no true prosperity or content. In this country the presence of such a class and in great numbers is essential to the development of our national strength and greatness and to the efficient working and permanent existence of our free institutions.

H. H. HOYT,
Counsel and Solicitor for Complainant.

Nov. 17, 1909.

FILED
MAR 30 1910
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 162.

CHARLES D. CAMPBELL, Appellant,

vs.

JOHN A. HUMBIRD & FREDERICK WEYERHAUSER, Appellee.

Brief of Charles D. Campbell, Appellant.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

M. H. STANFORD,
Of Counsel for Appellant.

1910
MERRITT & HECTOR, PRINTERS,
DULUTH.

Supreme Court of the United States

October Term, A. D. 1909.

No. 176.

CHARLES D. CAMPBELL, Appellant,

vs.

JOHN A. HUMBIRD & FREDERICK WEYERHAUSER, Respondents.

BRIEF OF M. H. STANFORD IN BEHALF OF APPELLANT.

This action involves the title to 160 acres of land situated in St. Louis County, Minnesota. The controversy had its origin in conflicting orders or rulings in the land department of the United States as to what was the eastern terminus of the Northern Pacific Railroad Company.

A statement of the case appears in the Brief of H. H. Hoyt, commencing at page 53.

The appellant, Campbell, claims the right over all others to purchase the land in controversy under Act of Congress of June 3, 1878, known as the Timber and Stone Act.

The Appellees, Humbird & Weyerhauser, claim title under and by virtue of a conveyance from the Northern Pacific Railway Company, which company claims to be the successor to the Northern Pacific Railroad Company,

and the basis of appellees' title is the land grant to the Northern Pacific Railroad Company by Act of Congress of July 3, 1864, and the joint resolution of Congress of May 31, 1870, and the preliminary selection of the land by list filed in the land office October 17, 1883, which selection was for the purpose of indemnifying the railroad company for losses in its place limits. This selection list specified losses in bulk.

Aprl 11, 1893, the Railroad Company, acting under the direction of the Secretary of the Interior, re-arranged the selection list so as to specify a particular tract lost as the basis for each selection, and in the re-arranged list there was set opposite the tract in controversy, the Southeast quarter (SE¼) of Section nineteen (19), Township one hundred and thirty-three (133), North of Range thirty-four (34) West, West of Duluth. The land claimed to be lost is situated on the South side of the line of the Northern Pacific Railroad Company in the western portion of the State, while the land involved in this action is situated on the North side of the line of the Northern Pacific Railroad Company, East of Duluth, and is known and described as the Southeast quarter of Section twenty-one, Township fifty-four, North Range Twelve West of the Fourth Prinicpal Meridian, within the Duluth land district of Minnesota.

The Railroad Company took no steps to claim or identify this land as a part of its indemnity until October 17, 1883, as before mentioned, when it filed its first list under said joint resolution, dated May 31, 1870, and thereafter the revised list filed on the 11th day of April, 1893. This selection was not approved by the Secretary of teh Interio. until November 7, 1905, and the land was patented to the Northern Pacific Railroad Company November 13, 1905.

ARGUMENT.

It will be noted that on November 9, 1896, and December 7, 1897, the date of the two last applications of the

plaintiff, the land in controversy had been restored to, and was a part of the public domain.

Campbell was prevented from acquiring title to the land by reason of the prior claim to the same by the Northern Pacific Railway Company, under its selections, and except for this claim based on said selection Campbell might have proceeded to perfect his title to the land.

The United States never has asserted any claim to the land, other than it belongs to the public domain.

Campbell claims that his rights are protected by Act of July 1, 1898, portions of which Act appear in Brief of Mr. Hoyt, at pages 76 and 72, and in the Brief of Mr. Bunn, commencing at page 40 and extending to page 43, but if the land is not covered by that Act, Campbell claims to have a preferential right of purchase, which right was ignored by the land department, and which he believes the court will protect.

The United States Circuit Court of Appeals in affirming the decree of the lower court in this case, held that the beneficiaries of the Act of July 1, 1898, are purchasers directly from the United States or occupants of and qualified settlers upon the lands therein described prior to January first, 1898, under some law of the United States or some ruling of the Interior Department and that Campbell did not come within the Act.

The appellees contend in their Brief that the purpose of the Act of July 1, 1898, was to furnish a means of adjustment of the controversy between the Northern Pacific and the settlers within its grant.

The construction placed on the Act of July 1, 1898, by the Court of Appeals and that for which the defendant in error contends, appears not only unreasonable but also unjust to a large number of claimants who without the aid of the Act might have perfected their title and excluded from its benefits a large portion of the claims which Congress undoubtedly had in mind at the time of its adoption.

The cardinal rule of construction is to ascertain and effectuate the legislative intent, and for this purpose where the language of the statute is in any manner ambiguous or the meaning doubtful, resort may be had to the surruonding circumstances, the history of the times and the defect or mischief which the statute was intended to remedy.

United States vs. Northern Pac. R. Co., 91 U. S. 72-79 (23 Law. 224-228);

Humbird vs. Avery, 195 U. S. 480 (49 Law. 295);

Platt vs. Pac. Ry. Co., 99 U. S. 48-64 (25 Law. 425-429);

Smith vs. Townsend, 148 U. S. 498 (37 Law. 535);

Lake Superior Ship Canal Ry. & I. Co. vs. Cunningham, 155 U. S. 354 (39 Law. 183);

Funk vs. St. Paul City Ry. Co., 61 Minn. 439.

In this connection I call attention to certain conditions relating to the indemnity lands of the Northern Pacific Railway which existed at the time of the passage of the Act of July 1, 1898. The bill was introduced after the denial by the department of an application of the Northern Pacific Railroad Company (December 13, 1897; 25 L. D. 501), for the suspension from entry and patent the remaining undisposed lands in the odd numbered sections within that part of the formerly recognized limits of the grant to said company lying east of the terminus established by the department, decision of August 26, 1896.

The order of February 28, 1898 (26 L. D. 265) was passed on the petition of the Northern Pacific Railway Company dated January 20, 1898, for a re-consideration of the decision of December 13, 1897, about referred to.

It also appears that the United States, September 3, 1897 (26 L. D. 265), had commenced action against the

Northern Pacific Railroad Company in the Circuit Court of the United States for the District of Minnesota, to secure a judicial determination by the courts as to the eastern terminus of said road.

The Dougherty case in the lower courts of Wisconsin had passed against the claim of said railroad company. A large number of suit had been instituted by the Northern Pacific Railroad Company in Minnesota, North Dakota, Montana and Washington.

The land department was confident as to the correctness of its decision, that the eastern terminus of the Northern Pacific Railroad Company was at Duluth and it resisted all efforts of the company in its desire for suspension of entry of these lands. Prior to this the lands had been restored to the public domain; the lands were applied for by persons duly qualified some of the lands passed to patent, others were purchased prior to January 1, 1898, while a large quantity of the lands unfit for cultivation, but valuable for timber were applied for under the timber and stone law, and by reason of contests and other conflicting claims the applications were not acted upon prior to the order of suspension of February 28, 1898.

Under these conditions this law was enacted, having for its purpose and object the quieting of disputes respecting the title to lands within the Northern Pacific Land Grant and protecting settlers and other claimants under the public land laws from the claims and suits of the company, as well as to protect the company itself against loss from its grant.

Said Justice Harlan, in Humbird vs. Avery, cited:

"Obviously, the first inquiry should be as to the object and scope of the act of 1898. Upon that point we do not think any doubt can be entertained, if the words of the act be interpreted in the light of the situation as it actually was at the date of its passage. Here were vast bodies of land, the right and title to which was in dispute between a railroad company holding a grant of public lands, and occupants and purchasers

—both sides claiming under the United States. The disputes had arisen out of conflicting orders or rulings of the land department and it became the duty of the government to remove the difficulties which had come upon the parties in consequence of such orders. The settlement of those disputes was therefore, as the circuit court said, a matter of public concern. If the disputes were not accommodated, the litigation in relation to the lands would become vexatious, extending over many years and causing great embarrassment.

In the light of that situation Congress passed the act of 1898, which opened up a way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned—the government, the railroad grantee, and indivual claimants. The railroad company evinced its approval of this action of the legislative department by a prompt acceptance of the act in its entirety. By such unqualified acceptance the railroad company agreed that, so far as it had any claim to the lands in dispute, whatever the act of Congress required to be done, might be done."

Said Justice Lochran, in the same case, in his opinion filed in the Circuit Court, 110 Federal Reporter 463:

"The obvious purpose of this act was to provide a certain speedy and equitable way in which all controversies between the railroad grantee or its successors, and purchasers or settlers upon odd numbered sections within the place or indemnity limits of the land grant who claimed by color of any law of the United States or any ruling of the land department should be settled and adjusted without contest or litigation, either in the land department or in the courts. The Railroad Company, by its express acceptance of the act, became bound by its provisions, and obliged to carry out its terms."

Under the circumstances then existing, is there reason for the narrow construction placed on this Act by the United States Circuit Court of Appeals in this case? On the contrary would it not be a natural and reasonable construction to give effect to the words of the Act "*And provided further that all qualified settlers, their heirs or as-*

signs, who prior to January 1, 1898, *purchased or settled upon or claimed in good faith under color of title or claim of right under any law of the United States or any ruling of the Interior Department any part of an odd numbered section* neither the granted or indemnity limits of the land granted to the Northern Pacific Railroad Company to which the right of such grantee or its lawful successor is claimed to have attached."

I quote from Sutherland on Statutory Construction, Section 346:

> "Statutes are seldom written in such precise and categorical terms as to point out inclusively and exclusively all their intended applications. General and more or less flexible language is used. It is construed with reference to the subject of the act, its purpose; and popular words are read and understood according to their common acceptation."

Section 347:

> "Strict construction is not a precise but a relative expression. It varies in degree of strictness according to the character of the law under construction."

Section 348:

> "The rule of strict construction is not violated by permitting the words of a statute to have their full meaning. The letter of remedial statutes may be extended to include cases clealy within the mischief they were intended to remedy, unless such construction does violence to the language used."

Judge Sutherland seems to have expressed in the foregoing quoted matter the spirit which has controlled this court in the consideration and construction of statutes in the various cases with which I am familiar.

The situation of the Northern Pacific Railroad Company and the various adverse claimants to the land at the time of the passage of the Act of July 1, 1898, was similar to that of the parties in Lake Superior Ship Canal Railway & Iron Company vs. Cunningham heretofore cited. In that case under Act of Congress of March 2, 1889, there was declared forfeited to United States certain of the lands grant-

ed to the State of Michigan by Act of Congress in 1856 in aid of a railroad, and by the same Act, that is March 2, 1889, the title to the Canal Company as to certain lands selected and certified with the approval of the Secretary of Interior in satisfaction of a subsequent canal grant was confirmed, except lands on which there was bona fide pre-emption or homestead claims on May 1, 1888, about 10 months previous to the passage of the Act which were also confirmed.

Lake Superior Ship Canal Railway & Iro. Co.
vs. Cunningham, 155 U. S. 354 (39 L. 189).

At the time of the passage of the Act of March 2, 1889, the Court held that neither the plaintiff nor the defendant had any right or title to the tract in controversy; that it was only by virtue of the Act of Congress in question that their respective titles were acquired.

Said this Court, construing the Act of March 2, 1889:

> "The second and third sections are the troublesome parts of the Act and it must be conceded that the true construction is not altogether obvious, and yet, when the situation as it existed and as it was then known to congress is considered, the meaning can be satisfactorily discerned."

This Court, after stating the various classes of claimants to the land and the circumstances under which their respective claims arose, said:

> "Congress under the circumstances with a view of securing an equitable adjustment of these conflicting claims enacted the second and third sections of the Act."

Without quoting further from the Act this court held that notwithstanding the words of the statute,

> "If the consideration received is still retained by the government the title of the lands thus * * * shall be and is hereby confirmed."

That the Act applied to homestead as well as to pre-emption claimants, notwithstanding the proviso relating to the consideration.

The Court also held that notwithstanding the defendant did not apply at the land office to enter his land until after the first day of May, 1888, he having previous to that date been in actual occupation of the land, his title was by the Act confirmed.

The Act of July 1st, 1898, when you consider the circumstances under which it was enacted and the purposes sought to be accomplished indicate what was in the mind of Congress when the bill was passed.

Its purpose was the settlement of disputes. In the language of Justice Harland, in Humbird vs. Avery:

> "If the disputes were not accommodated the litigation would become vexatious, extending over many years and causing great embarrassment. In the light of that situation Congress passed the Act of 1898, which opened the way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned, the government, the railroad grantees and individual claimants."

The law of 1898 is not like that of any of the land laws. It was passed for a particular purpose and when we recall that purpose it is difficult to believe that Congress intended to confine its benefits to purchasers and settlers. The words "claim" and "claimant" appear frequently in this Act, and the words are used as distinct and separate from "purchaser" or "settler."

The United States never has asserted any claim to the land other than it belongs to the public domain. Campbell was prevented from acquiring title to the land by reason of the prior claim to the same by the Northern Pacific Railroad Company and by the decision of the officers of the land department. Is there any legal or equitable reason in the light of the circumstances which existed when the Act of 1898 was passed for excluding parties from the benefit of the Act whose claims were initiated in good faith and only were prevented from perfecting their title by the actoin of the land department, and but for the claim of the railroad company.

It is a well established rule of this Court that where an individual in the prosecution of a right has done that which the law requires him to do, and he has failed to attain his right by the misconduct, mistake or neglect of a public officer the law will protect him.

Lytle vs. State of Arkansas, 9 How. 333, (13 Law. 160);

Duluth & Iron Range Railroad Company vs. Roy, 173 U. S. 587, (43 Law. 820).

The Railway Company and the defendants in this action now call for a narrow construction of the Act; they ask that it be confined to settlers upon the public land. Their attitude is different than at the time the terms of the Act were accepted by the Company. Shortly after it had accepted the terms of the Act the Railroad Company and the defendants in this action were for a wide open construction, but this their broad construction precluded every one from the benefits of the Act except the railroad itself and its grantees. Soon after the passage of the Act the Railway Company by conveyance to the plaintiffs in this action assumed to pass such interest as it had in nearly if not all of its selected lieu lands lying East of Duluth, with the effect, as claimed by the defendant and the Railroad Company to withdraw or exempt all of the lands so conveyed from the operations of the Act.

The Circuit Court and the Supreme Court of the United States held that this could not be done but the company, still claiming everything in sight, conveyed certain of its lands to various parties, among which was 40 acres deeded to Chas. Dreschel. This land had been occupied by Sjoli since 1884, claiming it under the homestead law. Sjoli did not acquire his patent until June 1, 1901, the Railroad Company having contested his claim through the land office. Notwithstanding that Sjoli had acquired his patent the company claimed a vested interest in the land by reason of its selection for lieu land filed in 1883. This court, however, held that the Railroad Company had no vested inter-

est in the land notwithstanding its selections until such selections had been approved by the Secretary of the Interior. As a matter of fact, which is of common notoriety, this Railroad Company and the defendants in this case by contests in the various departments of the office of the Secretary of the Interior and in the courts had striven to wear out all claimants to lands in its selected list, no matter how just or equitabel may have been their claim, and notwithstanding the well established rule of this court that the company acquired no vested interests in lieu lands until its selections were approved by the Secretary of the Interior.

The United States Circu't Court of Appeals in this case affirmed the decree of the lower court which dismissed the bill for want of equity and held (P. 113, Vol. 88 U. S. C. C. A.) as follows:

> "In this case Campbell was refused permission to purchase the lands he seeks. He never entered or paid for it. His right to buy was never recognized by the United States, and he was never in privity with it. One who has never by acceptance of a grant, or by settlement and improvement, or by occupation or by entry or by payment placed himself in privity with the United States in title before a patent issues to another, may not maintain a bill in equity to charge the title under the patent with a trust in his favor."

As to this proposition I beg leave to refer to the undisputed facts in the case.

It is admitted in paragraph second of the answer of the defendant, at page 69 of the record, that on the 26th day of October, 1895, Charles B. Campbell applied to the United States District Land Office at Duluth to purchase the land in question, under the provisions of the Act of Congress of June 3, 1878. That he tendered his written statement as alleged with the proper and legal fees to the register and receiver of said Land Office, and demanded of them to receive and file his application to purchase, and issue notice in accordance with law, and that such applica-

tion was refused by the said Land Office for the reason that it conflicted with the selection filed by the Northern Pacific Company. That said Campbell appealed, and the decision was rendered upon his appeal substantially as alleged in the bill.

It appears in the bill and was established by proof that Campbell renewed his application twice thereafter, with the same result as on his first application, and in each of the subsequent applications appealed, and the decision on each appeal was the same.

In the same paragraph of the answer defendant admits that a patent for the land ii question was thereafter issued by the United States, and alleged that it was duly executed on the 13th day of November, 1905. The defendant admits that at the time and before the issuance of said patent to the Northern Pacific Railway Company the patentee had knowledge and notice of the claim of the plaintiff.

This, and further admissions in the answer of the allegations of the bill, clearly establish the fact that Campbell in the prosecutions of his attempt to perfect his title under the Act of 1878, has done all that which the law requires him to do, and it was by reason of the action of the officers of the land department and their disregard of the law that he failed to attain his right.

The fact was established by the undisputed evidence in the case that Campbell was in every way qualified to enter the land under the Timber and Stone Act and except for the wrongful action of the land department would have perfected his title.

The above quoted portion of the opinion by the United States Circuit Court of Appeals in this case is contrary to the rule established by this court in the case of Duluth & Iron Range Railroad Company, plaintiff in error, vs. JoJseph Roy, defendant in error, 173 U. S. 587 (43 Lawyers 820). The only difference in the two cases is that

Roy was a homestead claimant and Campbell a claimant under the Timber and Stone Act.

The Roy case was an action to determine adverse claims to real estate and Roy had performed or tendered performance of all acts necessary under the homestead laws to complete his title and it was held:

> "That one who being qualified, settled upon public lands with a bona fide intention of acquiring the same, and when the plat of the survey of the township was filed, went to the land office to enter the land under the homstead laws, and on the denial of his offer instituted a contest which was pending in the general land office when the patent was issued to another by inadvertence and mistake, is entitled to relief against the title claimed under such patent."

I will quote in part the opinion in the Roy case, which includes the facts as follows:

> "The lands were patented to the State of Minnesota by the United States, as swamp and overflowed lands, and the plaintiff in error is the grantee of the State. The defendant in error claims under the homestead laws. At the time of the passage of the Act of 1860, under which the patent was issued, the lands were not swamp, wet, or overflowed, or unfit for cultivation, but were and now are, high, dry and fit for cultivation, except four or five acres in the northwest corner. In May, 1883, the defendant in error, then being qualified to do so, settled upon the lands with the bona fide intention of acquiring the same under the laws of the United States, established his residence thereon and ever since continued to be in the actual, exclusive, and notorious possession, making his home there, and cultivating and improving the same. When defendant in error commenced his residence on the lands the plat of the survey of the township, in which they were located, had not been filed subsequently, and after it was filed, to-wit, on the 2nd of July, 1883, he went to the land office with the intention of entering the lands under the homestead laws, and made a request to do so, but the land officers informed him that there was a mistake in the survey, and that in all probability a new survey would be or-

dered; that numerous protests had been made against the survey which were sufficient to raise the question of its accuracy; that it was unnecessary for him to protest or file on the land, and advised him to wait until such protests were determined.

He was a foreigner, did not know the English language, nor was he familiar with the laws, rules and regulations relating to the disposition of the public lands, and relied upon the representations of the officers and acted upon their advice.

On the 5th of August, 1884, he discovered that the state was claiming the lands as swamp lands, thereupon he duly made application to enter the same under the homestead laws, and tendered the fees to the local land officer. No adverse claim other than that of the state had arisen or was made to said lands, but his offer of entry was rejected on the ground that the same had inured to the state under the act of March 12, 1860, and that his application to enter the lands had not been made within three months after the filing of the township plat in the land office.

On the 6th of August, 1884, he duly filed contest, duly appealed from the rejection of his claim, which appeal and the affidavits attached were transmitted to the commissioner of the General Land Office, and were by him received and filed September 1, 1884.

On the 23rd of January, 1885, and while the appeal and contest were pending, the lands, through mistake and inadvertence, were patented to the State of Minnesota. The defendants took conveyance of the lands with notice of the right, claim and interest of the plaintiff, defendant in error.

The assignments of error attack the conclusions of the state courts as erroneous, and specify as reasons * * * . (c) The defendant in error is not the real party in interest and never had the legal or equitable title to the land, the United States being the only party which could attack the patent to the State of Minnesota, or invoke the action of the courts to determine its validity."

Justice McKenna, speaking for the Court at page 590 (P. 822 Lawyers), said:

"It is now too well established to need argument to support or a citation of authorities, that when a

patent is obtained from the United States by fraud, mistake, or imposition, the question thence arising becomes one of private right, and the courts in a proper proceeding and in execution of justice will devest or control the title thereby acquired, either by compelling a conveyance to the plaintiff or by quieting his title as against the defendants, and enjoining them from asserting theirs. Germania Iron Co. v. United States, 165 U. S. 379 (41 Law. 754); Williams v. United States, 138 U. S. 514 (34 Law. 1026). It was decided that this power extends to cases in which the patent was issued by inadvertence and mistake, the grounds relied on in the case at bar.

The plaintiff in error, however, contends that the defendant in error cannot invoke this doctrine because he is not in privity with the United States; that he has not proved or offered to prove to it, or established, or alleged even in this case, the ultimate facts upon which alone his claim could be recognized or its validity established. In other words, that he has not made or has not offered to make final proof.

This contention is attempted to be supported by the principles announced in Bohall v. Dilla, 114 U. S. 47 (29 Law. 61); Sparks v. Pierce, 115 U. S. 408 (29 Law. 428); Lee v. Johnson, 116 U. S. 48 (29 Law. 570). The principles are that to enable one to attack a patent from the government he must show that he himself was entitled to it. It is not sufficient for him to show that there may have been error in adjudging the title to the patentee. He must show that by the law properly administered the title should have been awarded to him.

We do not question these principles, but they only mean that the claimant against the patent must so far bring himself within the laws as to entitle him, if not obstructed or prevented, to complete his claim. It does not mean that at the moment of time the patent issued it should have been awarded to him. The acts performed by him may or may not have reached that completeness, may not have reached it, and yet justify relief, as in Ard. v. Brandon, 156 U. S. 537 (39 Law. 524); and in Morrison v. Stalnaker, 104 U. S. 213 (26 Law. 741). And because of the well established principle that where an individual in the prosecution of a

right has done that which the law requires him to do, and he has failed to attain his right by the misconduct or neglect of a public officer, the law will protect him. Lytle v. The State of Arkansas, 9 How. 333 (13 Law. 160).

It would be arbitrary to apply the principle to some acts and not to others—might destroy it utterly to require the performance of all. But we are indisposed to extend the argument, because we regard Ard. v. Brandon, as decisive.

But it is urged defendant in error may not be able to make final proof, and that the Land Department, whose jurisdiction is exclusive, may determine the lands not to be swamp or overflowed. That would be contrary to the findings of the court, which show full qualifications in the defendant, and we cannot presume that the Land Department will find against that fact."

It is conceded that Campbell was prevented from acquiriig his title by reason of the prior claim to the same by the Northern Pacific Railroad Company under its selections, and except for this claim Campbell could have perfected his title to the land.

If the complainant Campbell is not protected by the Act of July 1, 1898, we insist that he has a preferential right of purchase, which right was ignored by the Land Department.

It was held in the case of Sjoli vs. Chas. Dreschel, 199 U. S. 564 (50 Law. 311):

"That no interest in lands within the indemnity limits of the land grant to the Northern Pacific Railroad Company made by the Act of July 2, 1864, was acquired by that company by virtue of the filing of its list of selections of such lands to supply deficiency within the place limits but such lands remained open as before to settlement or occupation under the preemption or homestead laws until the selections were formally approved by the Secretary of the Interior."

This is in confirmation of the repeated decisions of this court.

The sole reason why Campbell was not permitted by the Land Department to perfect his title to the land was the alleged prior claim thereto of the Northern Pacific Railway Company. The selection of the land in suit was not approved by the Secretary of the Interior until the 7th day of November, 1905, and the patent therefor was issued six days thereafter. It must be apparent, therefore, that the claim of the Railway Company as against Campbell was void.

Mr. Hoyt in his brief discusses four propositions which I have not mentioned. They are as follows:

1. The lands lying East of Duluth claimed by the appellee are not within the grant of the Railway Company.

2. If they were originally within the grant the selections were cancelled by the order of July 6, 1896 and March 22, 1897.

3. Under the Act of July 2, 1864, the Northern Pacific Railway Company was limited to ten alternate sections of land per mile on each side of its railroad wherever it passed through a state and there was no authority in the grant to issue patents for land to the Railway Company on the north side of its line of road in lieu of lands deficient on the south side of the road, and such patents are void.

4. The Northern Pacific Railway Company is not the successor of the Northern Pacific Railroad Company, and the appellees have failed to prove title to the land in suit.

I endorse each and all of the foregoing propositions, but will not take the time of the court in discussing them here, all of which are,

Respectfully submitted,

M. H. STANFORD
Counsel for Appellant.

Dated, March 22, 1910.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

No. 146 OCTOBER TERM, 1909.

CHARLES D. CAMPBELL,
Appellant.

vs.

FREDERICK WEYERHAEUSER AND JOHN A. HUMBIRD,
Appellees.

BRIEF FOR APPELLEES.

FRANK B. KELLOGG,
STILES W. BURR,
Of Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 176. October Term, 1909.

CHARLES D. CAMPBELL,
Appellant,

vs.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD,
Appellees.

BRIEF FOR APPELLEES.

PRELIMINARY STATEMENT.

The appellant here, who was appellant in the Court of Appeals also, was complainant in the Circuit Court. The appellees here were defendants in the Circuit Court and appellees in the Court of Appeals. As it will be necessary for us to refer frequently to another case in which the position of the parties is reversed in this court, we think it may prevent confusion if throughout this brief we refer to the appellant as complainant and to the appellees as defendants.

The case is a suit in equity to subject the patent title to the land in controversy to the alleged superior equitable claim of the complainant. The Circuit Court entered a decree dismissing the bill,

which was affirmed by the Court of Appeals; and complainant has appealed to this court.

The defendants hold under patent of the United States, issued to the Northern Pacific Railway Company upon a selection of the land in controversy under the indemnity provisions of the Northern Pacific grants; the land having been conveyed by the Railway Company to defendants by warranty deed, prior to the commencement of this suit. The sole basis of complainant's claim is that on October 26, 1895, long subsequent to the selection of the land by the Railway Company, although prior to the approval of such selection by the Secretary of the Interior, complainant proffered to the Register and Receiver of the local land office of the district in which the land is situated, an application to purchase the same under the provisions of the act of June 3, 1878, familiarly known as the "Timber and Stone Act." The Register and Receiver rejected complainant's application on the ground that the land was subject to the prior selection thereof by the Railway Company; and this action of the Register and Receiver was affirmed on appeal. The Railway Company's selection was ultimately approved by the Secretary, and a patent for the land was duly issued to it.

After the issuance of patent to the Railway Company and the conveyance of the land to the defendants, complainant brought this suit. The Court of Appeals held, independently of other questions in the case, that complainant did not occupy a status which enabled him to question the patent

title in the courts; and affirmed the decree dismissing the bill without determining whether the officers of the Land Department ought to have accepted complainant's application and permitted him to purchase the land.

This case was submitted to and decided by the Circuit Court and the Court of Appeals at the same time with another case in which Herbert H. Hoyt was complainant and the defendants in this case were defendants; and that case is now before this court on appeal by the defendants under the title of Frederick Weyerhaeuser and John A. Humbird, appellants, v. Herbert H. Hoyt, appellee (No. 195 on the present calendar.) We shall have occasion to refer frequently in this brief to that case, and for brevity we shall refer to it as the "Hoyt case" and to this as the "Campbell case."

The Circuit Court held in favor of the defendants in both cases. The Court of Appeals held in favor of the defendants in the Campbell case, but against them in the Hoyt case; in the latter case reversing the decree dismissing the bill, and directing the entry of a decree in favor of the complainant.

The Hoyt case is in some respects similar to this, the Campbell case, and there are a number of questions common to both cases. But there are also important elements of difference between them—the Hoyt case involves questions which are not present in the Campbell case, and the Campbell case involves the very important question upon which the decision of the Court of Appeals was based, which is not in the Hoyt case at all.

Most of the questions common to both cases are discussed in the brief which will be filed herein by Mr. Charles W. Bunn, with whom we are associated as counsel for defendants in this case; and we do not intend to retraverse the ground covered by Mr. Bunn's brief. Our purpose is to confine this brief to the question peculiar to the Campbell case (which is the question that the Court of Appeals deemed decisive of the case); and to a discussion of two or three points common to both cases, supplementing, but not reiterating, the arguments in Mr. Bunn's brief.

We think it essential to a proper appreciation of the issues in this case that the court should consider the issues in the Hoyt case in their relation to those of the Campbell case. And we believe that a clearer understanding of the situation will be given by a statement of the facts of the Campbell case, followed by a statement of the points wherein the Hoyt case differs from this. But as we do not intend to argue all the questions which this case may possibly be held to involve, and as the other briefs to be filed will doubtless contain full statements of the facts, we think we may properly omit reference to matters which have no possible bearing upon the questions here to be argued.

STATEMENT OF FACTS.

On October 17, 1883, the Northern Pacific Railroad Company duly filed in the United States Land Office at Duluth, Minnesota, its selection list No. 15, whereby it applied to select the lands in controversy in these cases, and a quantity of other lands, as indemnity for specified losses within the place limits of its grant. The list so filed specified the lands lost, by specific description; but did not assign each selection to a particular description of land lost. This was in accordance with the practice of the Department at that time. Subsequently the practice was changed, so as to require a specific loss to be assigned for each tract selected. Thereafter, on April 11, 1893, pursuant to the direction and with the permission of the Secretary of the Interior, the Railroad Company filed a rearrangement of said list No. 15, in which the same bases of lands lost were assigned, but a particular tract lost was assigned as a base for each tract selected. At the time of filing the original list the company tendered and paid the fees required by law. The Register and Receiver accepted and allowed the selections, and attached to the list a certificate which acknowledged receipt of the fees and which contained the following:

> "We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Northern Pacific Railroad Company, under the grant to the said company by act of Congress approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad

Company by Chas. B. Lamborn, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, *and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved*, and that the whole of said lands are surveyed public lands of the United States, and within the limit of 40 miles on each side; and that the same are not, nor is any part thereof returned and denominated as mineral land or lands, nor claimed as swamp lands; nor is there any homestead, pre-emption, state or any other valid claim to any portion of said lands on file or record in this office." (Record, p. 2.)

The final approval of the selections by the Secretary of the Interior necessarily involved an affirmance of the findings of the Register and Receiver embodied in the foregoing certificate; indeed, the approval by the Secretary is based upon express findings to the same effect, made by the various examiners and chiefs of division and approved by the Commissioner (Record, pp. 93-96).

These selections were held up for many years, at first because of controversy as to whether Duluth or Ashland was the eastern terminus of the Northern Pacific grant, and later because of the contests waged in the Department by Campbell and other claimants. Meanwhile the Northern Pacific Railway Company succeeded to the rights of the Railroad Company under these selections, by foreclosure proceedings and judicial sale, and its successorship was in time duly recognized by the Interior Department, under advice of the Attorney General of the United States. Finally, on November 10, 1905, the selection of the land in controversy in

the Campbell case was approved by the Secretary of the Interior (Record, pp. 93-96), and on November 13, 1905, a patent for the land was duly issued to the Railway Company (Record, p. 89); which had theretofore conveyed the land to the defendants by warranty deed. The selection of the tract involved in the Hoyt case was approved and patent issued some weeks earlier.

On Ocober 26, 1895, the complainant presented to the Register and Receiver of the local land office an application to purchase the land in controversy under the act of June 3, 1878—the Timber and Stone Act. The Register and Receiver rejected the application on the ground that the land was already subject to the selection thereof previously made by the Railway Company. For the purpose of this argument, it may be conceded that Campbell possessed the necessary qualifications, that his application was in proper form, and that but for the prior selection of the land by the Railway Company it would have been open to purchase under that act and complainant's application should have been allowed. The bill also alleges that Campbell "renewed" his application on November 9, 1896, and again on December 28, 1897, but that on each occasion his application was rejected by the Register and Receiver on the same ground as before.

In order that the issue of law which we propose to discuss may be clearly defined, we state here that the arguments in this brief will proceed upon the assumption that if the prior selection of this

land by the Railway Company did not operate to withdraw or segregate it as against other claims subsequently initiated, and if, notwithstanding such selection, the land was still to be regarded as part of the unappropriated public domain, open to entry or settlement by any qualified person, then the action of the Register and Receiver was erroneous; otherwise complainant's application was rightly rejected.

Complainant appealed to the Commissioner of the General Land Office from the decision of the Register and Receiver rejecting his original application, but he took no appeal from the action of those officers on the successive "renewals" of that application. On August 31, 1900, the Commissioner filed a decision affirming the rejection of complainant's application. Action on that decision was suspended for a time; but on October 3, 1901, the Commissioner filed another decision finally rejecting the application (Record, pp. 4-8, 27-30).

Complainant appealed to the Secretary of the Interior, who, on September 6, 1905, rendered a decision affirming the action of the Commissioner and of the Register and Receiver. That decision was made upon the authority of the previous decisions of the Secretary in the cases of Eaton v. Northern Pacific Railway Company, 33 L. D. 426, and Jones v. Northern Pacific Railway Company, 34 L. D. 105. (Record, pp. 8-9). The opinion of the Secretary in the case of Jones v. Northern Pacific is printed in the record in this case (Record, pp. 30-38).

This suit was commenced November 16, 1905, in the District Court of St. Louis county, Minnesota, whence it was removed by defendants to the United States Circuit Court. Complainant concludes his bill of complaint with the following prayer for relief:

> "Wherefore, this plaintiff prays that this Honorable Court by its decree will adjudge and decree that the patent issued by the United States to the Northern Pacific Railway Company was so issued under a mistake of law, *and that said patent be delivered up and cancelled; and that the plaintiff may proceed to final proof for the land* here in controversy; and that all persons claiming or to claim by or under the defendants be forever barred and enjoined from claiming any title, right or interest in said land adverse to this plaintiff, and for such other and further relief as may be just." (Record, p. 26)

Complainant further prayed an injunction *pendente lite* against the cutting of timber on the land.

It appears affirmatively upon the face of the bill of complaint, as well as from the evidence, that complainant never tendered payment for the land at the local land office or elsewhere, and that he never offered to make the proofs required by law. He rested solely upon his declaratory statement or application, rejected by the local land officers; and neither before nor after the adverse decisions by the Commissioner and Secretary did he make any effort to comply with the requirements as to proof and payment which are necessary prerequisites to the acquisition of land under the Timber and Stone Act. Complainant alleged in his bill that he

> "has at all times been ready and willing to perfect his title to said land by doing all things that the law requires of him, including the payment for the land; and would long ago have completed his entry by payment had he not been prevented from so doing by reason of conflicting claims to the same, etc." (Record, p. 9)

But this is a very different thing from performance of the conditions which are essential to the acquisition of land under the public land laws, and very different from an actual *tender* of proofs and payment. Indeed, there is neither allegation nor evidence that complainant was ever *able* to make proof or payment. The allegation quoted above is the only thing in the bill which bears upon that subject, and all the evidence on the point is comprehended in the following questions and answers in the course of the examination of complainant, by his own counsel, as a witness in his own behalf:

> "Q. Have you at all times since your application in 1895 for this land been ready and willing to complete your entry by paying the amount the Government required for acquiring that land? A. Yes, sir.
>
> Q. Why have you not completed your entry? A. Well, because I couldn't. I had contest on the land and before I got that off I couldn't do anything after that.
>
> Q. Couldn't do anything on account of an order from the Department that nothing further should be done in such cases? A. Yes, sir." (Record, p. 80)

In short, it not only appears affirmatively that there was no offer or tender of proof or payment, but there is also neither allegation nor evidence that the complainant was ever in position to make such proof or payment.

So far as concerns the questions to be argued in this brief, the essential difference between the Hoyt case and the Campbell case is this: On December 17, 1897, Hoyt's grantor, Jones, made a similar application to purchase, under the Timber and Stone Act, the land involved in that case. But instead of rejecting his application, the Register and Receiver received and allowed it; and on March 22, 1898, Jones was permitted to make final proof in the usual manner. Subsequently, on December 10, 1898, Jones paid the full purchase price for the land required by the provisions of the Timber and Stone Act, and the usual final receipt was issued to him. It is true that across the face of the receipt was written a memorandum to the effect that the receipt was issued "subject to any claim the Northern Pacific Railroad Company may have to the lands herein described"; but in other respects the receipt was in usual form. (See opinion in Hoyt case; Hoyt v. Weyerhaeuser, 161 Fed. 324, 326.)

Campbell's application was rejected when proffered, and he never made any offer of the requisite proofs and never paid or tendered payment of the required purchase price; while Hoyt's grantor made the necessary proofs and payment and obtained a final receipt, so that nothing remained to be done on his part to entitle him to patent in case the land was open to his entry at the time it was made.

The distinction between the cases, and the ground upon which the Court of Appeals denied complainant relief, is thus stated by Judge Sanborn, in delivering the opinion of that court (Campbell v. Weyerhaeuser, 161 Fed. 332):

"The facts of this case differ from the facts in that (the Hoyt) case in this: In Hoyt's case his remote grantor Jones entered, purchased and paid for his land * * * before its selection by the Railway Company had been approved by the Secretary of the Interior. In this case the complainant Campbell repeatedly filed with the Land Department his application to enter the land * * * before the Railway Company's selection of that land was approved by the Secretary of the Interior, but the officers of the Land Department rejected his application each time and refused to permit him to enter the land. In Hoyt's case Jones became the vendee of the United States, paid for and became the equitable owner of his land. In this case Campbell was refused permission to purchase the land he seeks, he never entered or paid for it, his right to buy it was never recognized by the United States, and he was never in privity with it. The difference is radical and fatal to this suit in equity. One who has never by acceptance of a grant, or by settlement and improvement, or by occupation, or by entry, or by payment, placed himself in privity with the United States in title before a patent issues to another, may not maintain a bill in equity to charge the title under the patent with a trust in his favor (Citing Smelting Co. v. Kemp, 104 U. S. 636, 647, and other authorities). The indispensable basis of a suit in equity to charge the legal title to land under a patent is an equitable interest in the land in the complainant which is superior to the legal title in the defendant."

And it was held accordingly that Campbell's bill was properly dismissed. But in the Hoyt case, on the contrary, Hoyt was held entitled to a decree.

(Note: The italics in quotations appearing in this brief are ours, unless the contrary is expressly indicated.)

ARGUMENT.

I.

THE COMPLAINANT DOES NOT OCCUPY A POSITION WHICH ENABLES HIM TO ATTACK THE PATENT TITLE, EVEN IF IT SHOULD APPEAR THAT HIS APPLICATION TO ENTER THE LAND WAS WRONGFULLY DENIED AND THAT PATENT OUGHT NOT TO HAVE ISSUED TO THE RAILWAY COMPANY.

In the sequence of argument which seems to us most natural and convenient, we shall first present the considerations and authorities in support of the conclusion reached by the Court of Appeals that the complainant did not occupy a status such as enabled him to question the patent title in this suit.

As the principal authority for its decision, the Court of Appeals cites the great leading case of Smelting Co. v. Kemp, 104 U. S. 636, 640, 647. In that case Mr. Justice Field said:

> "The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. * * * If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or

> acted from imperfect views of their duty, or even from corrupt motives a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands. Boggs v. Merced Mining Co., 14 Cal. 279, 363. It does not lie in the mouth of a stranger to the title to complain of the act of the Government with respect to it. If the Government is dissatisfied, it can on its own account authorize proceedings to vacate the patent or limit its operation."

But there are other authorities, not referred to by the Court of Appeals, which furnish stronger support for its decision than the case specifically cited in the opinion. The leading case on this question is probably Bohall v. Dilla, 114 U. S. 47, although Sparks v. Pierce, 115 U. S. 408, and Lee v. Johnson, 116 U. S. 48, are cases as closely in point which are cited only less frequently than Bohall v. Dilla. In that case Justice Field said, on page 51:

> "To charge the holder of the legal title to land under a patent of the United States as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show *that he himself was entitled to the patent from the Government*, and that in consequence of erroneous rulings of the officers of the land department upon the law applicable to the facts found it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. *It must appear that by the law*

properly administered the title should have been awarded to the claimant. Smelting Co. v. Kemp, 104 U. S. 636, 647; Boggs v. Merced Mining Co., 14 Cal. 279, 363. It is therefore immaterial for the decision of this case what our judgment may be upon the conclusion of those officers as to the possession of the patentee."

In Sparks v. Pierce, 115 U. S. 408, 413, it is said:

"To entitle a party to relief against a patent of the government, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the land department, and being respected, *would have given him the patent.* It is not sufficient to show that the patentee ought not to have received the patent. *It must affirmatively appear that the claimant was entitled to it*, and that in consequence of erroneous rulings of those officers on the facts existing it was denied to him. Bohall v. Dilla, 114 U. S. 47, 51."

In Lee v. Johnson, 116 U. S. 48, 50, the court said:

"He (the plaintiff) must in all cases show that but for the error or fraud or imposition of which he complains *he would be entitled to the patent.* It is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued. Bohall v. Dilla, 114 U. S. 47, Sparks v. Pierce, 115 U. S. 408."

In Steel v. Smelting Co., 106 U. S. 447, 454, Mr. Justice Field said:

> "So with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the government to which the alienation of the public lands is confided, the remedy of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises *as would give him the title if the patent were out of the way.* If he occupy with respect to the land no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation."

In all of the decisions cited above the conclusions announced represent the unanimous judgment of the court and we cannot learn that these views have ever been criticised or departed from.

Upon the foundation of these authorities a great body of decisions has been built up in the State and Federal courts, in which the principle that the title derived under patent for land over which the Interior Department has jurisdiction can only be attacked by direct proceeding in equity, and then only at the suit of one who has himself performed all the conditions necessary to entitle him to patent, has been recognized, extended and applied.

In Peabody Gold Mining Co. v. Gold Hill Mining Co., 106 Fed. 241, Judge Morrow, after citing and quoting from some of the cases cited above, said:

> "It is alleged that said patent was fraudulently obtained from the land department * * * But nowhere does it appear that the complainant would have been, at the time of the issuance of the patent, or would now be, entitled to the patent itself. * * * Con-

> ceding for the sake of the argument that the complainant could show that the patent should not have been issued to the respondent, this fact would not be sufficient and would not avail without the additional showing that the patent should have been issued to the complainant."

In Baldwin v. Keith, 13 Okla. 624, 75 Pac. 1124, the syllabus, which is prepared by the court itself, thus states the point decided:

> "In an action to declare a resulting trust, where the plaintiff claims the land under the homestead laws, an essential averment of the petition, and one without which the petition does not state a cause of action, is that the plaintiff has resided upon, cultivated, and improved the land *for a period of time and to an extent that upon final proof he would be entitled to a patent thereto.* It is not sufficient that the patentee ought not to have received the patent. It must affirmatively appear from the allegations of the petition that the claimant was entitled thereto, and that, in consequence of the erroneous rulings of the Secretary of the Interior on the facts existing, it was denied him."

In the opinion the court says:

> "However, * * * it is quite obvious that the plaintiff in error cannot maintain this action, because of one elementary principle underlying all actions to declare a resulting trust. That is: 'To entitle a party to relief against a patent of the government of the United States, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and being respected, would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. It must affirmatively appear that the claimant was entitled to it, and that, in consequence of the erroneous rulings of those

officers on the facts existing, it was denied him.' Bohall v. Dilla, 114 U. S. 47, Sparks v. Pierce 115 U. S. 408, Parker v. Lynch, et al., 7 Okla. 631, 56 Pac. 1082. If we were to concede that the defendant in error had no right to the patent to the land in controversy, by what right can the plaintiff in error contend that he is entitled to a patent thereto? In the petition it is alleged that he made application to file a contest, which contest was not entertained, but was rejected. * * * Again, he made application to enter the land. *This application gave him no vested right*, and particularly when the land was covered by an allotment entry. But it is alleged that the plaintiff in error established a residence upon the land and made improvements thereon. * * * But, notwithstanding this, still the plaintiff in error cannot maintain this action upon the theory that he had established a residence upon the land, *because he had not resided thereon a sufficient length of time to entitle him to a patent therefor*, even though the defendant in error had had no right whatever to the property. The petition does not contain an allegation that the plaintiff in error resided upon the land for any specific time, other than is shown by a copy of the affidavit which was filed before the Secretary of the Interior on the motion for reveiw. * * * But even were we to look at the facts as shown by the copy of the affidavits contained in the record, still the record shows that the plaintiff in error did not reside upon the land for a period exceeding two years. *This would not entitle him to a patent from the government. He had not resided there a sufficient length of time to enable him to make final proof under the homestead laws, and, not being entitled to a patent from the government, he cannot maintain this action to declare a resulting trust.*"

In Chapman v. Quinn, 56 Cal. 266, affirmed in Quinn v. Chapman, 111 U. S. 445, the case was that

of a preemptor who settled on the land and while in residence thereon offered to file his declaratory statement, which was refused on the ground that there was a contest pending between other claimants. This Court afterwards held that this was no ground for refusing to receive Quinn's declaratory statement, but held that the equities were against him. Quinn's status, therefore, was that of a preemptioner who was in actual possession of the land, having settled thereon according to law, but whose application to file thereon had been wrongfully rejected by the land office. The court said:

> "The law under which he claims the right to preempt the land in controversy declares, among other things: 'That prior to any entry being made under or by virtue of the provisions of this act proof of the settlement and the improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie.' This proof it is essential the defendant should make before *he* (italics by the court) could be entitled to enter the land; and of this proof the register and receiver are the exclusive judges, subject to the supervision and control of their superior officers of the Land Department. The courts have no power to substitute their judgment upon the facts of the defendant's alleged settlement and improvement of the land for that of the officers to whose judgment Congress has confided the determination of those questions. Cases are numerous in which the equitable rights of persons claiming under the preemption laws have been protected by the courts against the legal title acquired by other parties by means of the introduction of false testimony, or other imposition upon the officers of the Land Department, or by the misconstruction by those officers of the law, upon an admitted state of facts. But in all of such cases

> of which we have any knowledge, the party thus protected had connected himself with the title of the government, and thereby acquired some right which, in equity, entitled him to protection. We know of no case where the holder of the legal title under a patent from the government has been compelled by a court of equity to convey that title to one occupying the position of the defendant in the present action. To do so would be to compel the conveyance of the title from the grantee of the government to one who had established no right to purchase the land from the government itself. Nor do any of the cases cited support the position taken by the defendant."

In the course of that opinion the court examined and distinguished a number of the principal cases, most cited as authority, in which the relief sought in the case at bar was granted; showing that in every such case the claimant had himself earned the patent, having performed every act necessary to entitle him to it, and that the land should have been awarded to such claimant in the first instance. This is the distinction which seems to run through all the cases in the books, and is the basis for the rule which the Court of Appeals rightly applied against complainant in the case at bar.

Parsons v. Venzke, 4 N. D. 452, 61 N. W. 1036, affirmed by this court in Parsons v. Venzke. 164 U. S. 89, was a case where the plaintiff's preemption final certificate had been canceled arbitrarily and without notice, upon the ground that the preemptor had not complied with the law as to residence and improvements, and patent for the land

had been issued to another; and the plaintiff undertook to subject the patent title to his alleged superior claims. The court held that if the entry was improperly canceled, the entryman would be protected in equity, but that it was incumbent upon him to show not only that the cancellation was arbitrary, but also that he himself was entitled to patent, *having earned the land by full compliance with all the requirements of law.* The opinion is a very elaborate one, in which many authorities are cited and examined, and in the course of it it is said:

> "Moreover, arbitrary action of the Department in cancelling the entry would not of itself entitle the plaintiff to the relief he seeks. He invokes equity to decree *that he is in equity entitled to the legal title. His position is that he had earned it*, and that the government held it in trust for him, and that the government's grantee also holds it impressed with such trusts. It is not the certificate which entitles him to the legal title. The right to the title comes from compliance with the law. * * * By showing that he had no opportunity to be heard before the Department, the entryman makes out a case for a hearing in court; but as he assumes the attitude of complaining of the action of the Department, he must show that it operated to his prejudice. As he is in the position of claiming the legal title, he must *prove by evidence that he has fully earned the same by an honest compliance with the law. The burden is on him.*"

Power v. Sla, 24 Mont. 250, 61 Pac. 468, presents a very careful opinion in which a large number of authorities are examined. The court says:

"It is incumbent upon them (the claimants against the patent) to show such facts as that it will appear therefrom that they have connected themselves with the original source of title in the government, and that their rights are injuriously affected by the existence of the patent. They must show such equities in themselves as will control the legal title in plaintiff's hands. (Citing numerous cases, including the decisions of this court previously cited in this brief.) Making the statement in another form, the defendants stand in no attitude to question the title of plaintiffs unless by their allegations they present facts showing not only that at the time the patent was issued to plaintiffs they (plaintiffs) were not entitled to it by reason of their failure to perform the conditions required by law, *but also that they themselves have performed all the conditions necessary to entitle them to demand a patent from the government.* The rule is deduced from the cases cited, that after the patent has passed to the entryman, mere strangers will not be heard to question the validity of the proceedings by which the patent was obtained. In such cases the government only can contest its validity in proceedings properly brought to set it aside. * * * The answer, therefore, fails to show that defendants so connected themselves with the government that they may assert title in themselves at the time plaintiff's patent was issued, and that their rights have been injuriously affected by an erroneous application of the law by the officers of the Land Department."

In Parker v. Lynch, 7 Okla. 631, 56 Pac. 1082, 1091, Parker, the complainant, had filed an application to contest the homestead entry of defendant, which application was erroneously denied. It was conceded that the defendant's entry was in fact unlawful, and that if Parker had been permitted

to contest the entry, as he was legally entitled to do, he would have prevailed and would himself have secured the land under the homestead law. But he was denied relief; and the court, fortifying its opinion by liberal quotations from Bohall v. Dilla, Sparks v. Pierce, Lee v. Johnson, and Smelting Co. v. Kemp, *supra*, including all the language quoted from those decisions elsewhere in this brief, said:

> "The real question is, what right has Parker in this land? In order to win he must have a better equity than Lynch. He must have had an interest in the land that would have ripened into a title if the law had been properly administered. It is not sufficient for him to allege that Lynch was disqualified. * * * One who has no interest in the land cannot complain, because he could not be injured by the action of the Government in issuing a patent for the land to another."

Small v. Rakestraw, 28 Mont. 419, 72 Pac. 746, 748, affirmed by this court in Small v. Rakestraw, 196 U. S. 403, was a case very similar in many respects to Parker v. Lynch. The court there cited and applied the rule of Bohall v. Dilla, Smelting Co. v. Kemp, and Boggs v. Merced Mining Co., and quoted from Bohall v. Dilla the precise language which is quoted elsewhere in this brief. And the same rule was declared and applied, on the authority of the same cases, in Graham v. Great Falls Water Power Co., 30 Mont. 393, 76 Pac. 808, and in Gebo v. Clarks Fork Coal Mining Co., 30 Mont. 87, 75 Pac. 859. In the latter case the court said:

> "The very foundation of the rule is that the patent was issued to another when plaintiff

> was justly entitled to it. Then the complaint must show such facts as that it will appear therefrom that she has connected herself with the original source of title in the government, and that her rights are injuriously affected by the existence of the outstanding patent. She must show such equities in herself as will control the legal title in the defendant's hands. Power v. Sla, 24 Mont. 243, 61 Pac. 468; * * * She must show affirmatively that upon her part she did or offered to do *all that was necessary to be done in order to secure the patent*, and upon the doing of which patent should have issued to her, Bohall v. Dilla, 114 U. S. 47; and these in addition to the facts necessary to be shown in order to entitle her to make the filing in the first instance."

A recent case very much in point is Pierson v. Loveland, 16 Idaho, 628, 102 Pac. 340. That case deals with the disposition of certain Carey Act lands by the State Board of Land Commissioners, but, as will be seen from the opinion, the principles applied are those which control the disposition of the public lands of the United States. It appears that Loveland made an entry of the land in controversy but failed to comply with the law, so that his rights became forfeited; whereupon Pierson duly initiated a contest against Loveland's entry and applied to enter the land on his own behalf. The Board of Land Commissioners refused to consider Pierson's contest and rejected his application to enter. Pierson appealed from this decision of the Board, but the court held that an appeal from such a decision would not lie, and that his remedy was by mandamus to compel the Board to hear his contest and allow his application. Meanwhile, the

Board issued a patent for the lands to Loveland's assignee. Before patent was issued Pierson settled on the land, built a house thereon, cleared and cultivated a considerable area, and maintained actual residence thereon until forcibly ejected by Loveland's assignee. After patent had issued Pierson brought a suit in equity to have the patent title impressed with a trust in his favor. The court held that Pierson's contest was well brought and should have been entertained by the Board; that Loveland's entry was forfeited and should have been cancelled under that contest; that Pierson's application to enter the land should have been allowed by the Board; and that had he pursued the proper remedy, by mandamus to compel the Board to act on his contest and application, he must have prevailed—in short, that the Board committed an error of law in rejecting Pierson's contest and application and in awarding the land to Loveland's assignee and issuing the patent to him. Nevertheless the court held, following and applying the rule of the authorities cited above, that Pierson had no standing to question the patent title. It is said:

> "The question for determination is, does the complaint state a cause of action? It is well settled that in an action of this kind, to entitle a party to relief he must show a better right to the land than the patentee, such a right as should have been respected by the officers of the Land Department, and being respected would have given him the patent. Facts sufficient must be alleged to show *that the claimant was entitled to the patent* and that in consequence of erroneous rulings of the land officers on questions of law, the patent was

denied to him. It must contain allegations showing *that the plaintiff has done all of the acts required by law to be done and performed in order to entitle him to the patent*, or, at least, all of the acts which were in his power to do that were required by the law to be done, and offered to do any and all acts required by the law to be done, which he was prevented from doing by reason of the errors of law committed by the officers of the Land Department. It is admitted that the plaintiff was prevented from a hearing on his contest because of an error of law committed by the State Board of Land Commissioners. * * * After the plaintiff's contest was dismissed by said Board, he took an appeal from that action of the Board to the District Court. * * * In that appeal the plaintiff pursued the wrong remedy. * * * Had the plaintiff proceeded in that way (by mandamus) his rights could have been fully protected. As he failed to do that, he has failed to do all that he might have done to protect his rights. * * * He not only failed and neglected to proceed as above indicated, but his counsel admit *that he failed to procure a water right and failed to offer final proof for said land.* As he neglected and failed to do and perform those things, he is not in a position to maintain this action, for under the well settled rule of law in this class of cases, the plaintiff must allege *the performance of all the acts required by law necessary to show that he was entitled to the patent at the time the action was commenced*, with the exception of those acts which he was prevented from performing or offering to perform by reason of the error of law committed by said Board. In Bohall v. Dilla, 114 U. S. 47, the court had under consideration a case something like the one at bar, and said: 'To charge the holder of the legal title to land under a patent of the United States, as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he

himself was entitled to the patent from the government, and that, in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered the title should have been awarded to the claimant.' Even if the State Board had not made an error of law, it does not appear from the allegations of the complaint that the appellant would have been entitled to receive a patent for said land at the time patent was issued to Diehl, he not having complied with the part of the law requiring him to present his final proof showing certain facts, and showing that if he had not complied fully with the law that his reason for non-compliance was the errors in law committed by the Board in granting said extension of time. The case of Sparks v. Pierce, 115 U. S. 413, involved the question of relief in equity against a patent issued by the United States, and the court there held, as follows: 'To entitle a party to relief against a patent of the government, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and being respected would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. It must affirmatively appear that the claimant was entitled to it, and that, in consequence of erroneous rulings of those officers on the facts existing, it was denied to him.' In support of that rule, the court cites Bohall v. Dilla, 114 U. S. 47. See also Quinn v. Chapman, 111 U. S. 448; Lee v. Johnson, 116 U .S. 53; Cunningham v. Ashley, 14 How. 379; Parker v. Lynch (Okla.) 56 Pac. 1082; Baldwin v. Keith (Okla.) 75 Pac. 1124; Jameson v. James (Cal.) 100 Pac. 700."

It will be noted that the Idaho court held that Pierson failed to comply with two different classes of requirements necessary to be observed in order to give him a status which would enable him to attack the patent, viz: not only in his failure to pursue the proper remedy to compel the Board of Land Commissioners to hear his contest and receive his application, but also in his failure to make proper final proofs and to obtain a water right—although it is plain that he was deterred from doing these latter things by the refusal of the Board to recognize his claim. And it was held that a failure in either respect was enough to bar an attack upon the patent title, even had the other requirement been complied with. This answers the suggestion, should it be made, that the rejection of his initial application to purchase the land relieved complainant from the duty of offering proofs and payment because such offer would be useless in the face of the refusal of the officers of the Land Department to entertain the application. This is a phase of the subject which will receive further consideration elsewhere in this brief.

In Deweese v. Reinhard, 61 Fed. 777, decided by the Circuit Court of Appeals for the Eighth Circuit and affirmed on another ground in Deweese v. Reinhard, 165 U. S. 386, Judge Thayer says:

> "At the threshold of this case we are confronted with the question whether the appellant stands in such privity with the United States as entitles him to maintain a suit to annul the certification of the land in dispute to the State of Nebraska, which act on the part

of the Secretary of the Interior had the legal force and effect of a patent. * * * We do not dispute the general proposition that a person becomes the equitable owner of a tract of land forming a part of the public domain, if it has been surveyed and placed on the market, when he makes prior settlement thereon under the pre-emption or homestead laws of the United States, *and subsequently complies with all of the terms and conditions of those laws which entitle him to a patent.* It may also be conceded that the right of a homestead or pre-emption claimant to a patent, *when he has made a lawful settlement and done everything required of him to perfect his claim*, cannot be prejudiced either by the intentional misconduct of the officers of the Land Department or by their mistakes of law or neglect of duty. Moreover, it may be admitted that the holder of an equitable right or title to a tract of land which has been acquired in the manner aforesaid by a lawful settlement thereon, *and by the performance of such other acts as the law prescribes to entitle a settler to a patent*, stands in privity with the government, in such sense that he may maintain a bill to cancel a patent erroneously issued to a third party for the same land after the settler's rights had become vested."

In Hartman v. Warren, 76 Fed. 157, 163, Judge Sanborn, speaking for the Court of Appeals for the Eighth Circuit, said:

> "Can one who has acquired no right to a tract of land maintain a suit in equity to charge the owner of it with a trust in his favor, because the United States sold and granted it to that owner through an error of law? This is the next question in this case, and it is not a new question in this court. It was carefully considered and answered in the negative in the case of Deweese v. Reinhard, 61 Fed. 777."

Then after some discussion of the authorities the learned judge quoted from Smelting Co. v. Kemp, 104 U. S. 636, 647, the language quoted from that case on a preceding page of this brief, and continued:

> "*This is a wise and salutary rule. It relieves the government of the expense of vexatious litigation, and the owners of the land from the speculative attacks of those who have nothing to lose.* It has been repeatedly announced and uniformly maintained in the national court, and it is fatal to the suit of appellant in this case."

The Circuit Court of Appeals for the Ninth Circuit, in American Mortgage Co. v. Hopper, 64 Fed. 553, 556, an opinion in which Mr. Justice McKenna concurred, said:

> "The appellees relied upon the patent from the government of the United States. The suit is brought to obtain a decree declaring that the appellant is entitled to the patent, which was issued to appellee Hopper. To entitle it to this relief it was essential for it to *affirmatively show* that if the law had been properly administered *the title would have been awarded to it.* The suit cannot be maintained simply upon a showing that the land department erred in adjudging the title to the patentee. These principles are well settled, both in this court and in the Supreme Court of the United States."

In Sacramento Savings Bank v. Hynes, 50 Cal. 195, the defendant alleged, as an equitable defense in a suit founded upon a patent title, that he had the superior right to the land because he had entered it under the preemption law and had complied with all of the requirements of that law, except

those relating to proof and payment; and that he had *offered* to make proper final proof and payment, but was wrongfully refused permission to do so. The court said:

> "The defendant cannot maintain the position that he is entitled in equity to the legal title which was acquired by the plaintiff, unless he, the defendant, *complied with the provisions of the preemption law applicable to his case*, or was prevented from so doing by some act by means of which the plaintiff acquired an undue advantage in the proceeding. Among others is the provision that the claimant must prove, to the satisfaction of the register and receiver, the facts upon which his claim rests. The allegation of the equitable defense that when the defendant appeared before those officers to prove his right of preemption, he was not permitted to make such proof because of the 'wrongful and fraudulent acts of the plaintiff,' is not the allegation of any fact which caused or induced those officers to refuse to hear his proofs. The allegation is too vague to be considered as the allegation of a fact."

Wirth v. Branson, 98 U. S. 118, is one of the cases in which the complainant was held entitled to relief. That case was decided before the rule upon which we rely had been declared and defined by this court in such cases as Smelting Co. v. Kemp, Bohall v. Dilla, Sparks v. Pierce, and Lee v. Johnson. But even then the limitation upon attacks on the patent title, with respect to the status which the complainant must occupy in order to maintain a suit of this character, was recognized by the court; as will appear by the following extracts from the opinion, which was by Justice Bradley:

"The rule is well settled by a long course of decisions that when public lands have been surveyed and placed in the market or otherwise opened to private acquisition, a person *who complies with all the requisites necessary to entitle him to a patent* in a particular lot or tract is to be regarded as the equitable owner thereof. * * * This was laid down as a principle in the case of Lytle v. Arkansas, and has ever since been adhered to. See Stark v. Starrs, 6 Wall. 402. Subsequent cases which have seemed to be in conflict with these *have been distinguished from them by the fact that something remained to be done by the claimant to entitle him to a patent, such as the payment of the price, the payment of the fees of surveying, or the like.* The proper distinctions on the subject are so fully stated in the cases of Stark v. Starrs, Frisbie v. Whitney, The Yosemite Valley Case, Railway Co. v. McShane, 22 Wall. 444, and Shepley v. Cowan, 91 U. S. 330, that it would be supererogation to go over the subject again."

There are a great many cases in the books, in addition to those already referred to, which in some form or other recognize the rule that the patent title to land over which the Interior Department had jurisdiction can only be attacked or questioned by direct proceeding in equity, and then only at the suit of one who has himself performed all the conditions entitling him to patent for the land. Some of these are cases where the complainant was held entitled to the relief sought, but where the rule stated was expressly recognized by the court; others are cases where complainant was denied relief under this rule, although the decision might have been put on a different ground; and still others are cases in which the facts were

such that the rule was properly applied. But everywhere the rule has been accepted by the courts, and we have found no case in which it has been criticised or in which an attempt has been made to limit the rule or restrict its operation. The authority of Smelting Co. v. Kemp, Bohall v. Dilla, Sparks v. Pierce, and Lee v. Johnson has been universally acknowledged, and we cannot learn that the correctness of those decisions has ever been doubted or denied by any court of last resort. The length to which we have already gone forbids further quotation from or discussion of the authorities on this point. We cite below a few additional cases to the same effect which are quite closely in point; but there are many others of more or less direct bearing which we think it unnecessary to give specific reference to:

Jameson v. James, (Cal.) 100 Pac. 700.

Boggs v. Merced Mining Co., 14 Cal. 279.

Doll v. Meador, 16 Cal. 295.

Manning v. San Jacinto Tin Co., 9 Fed. 726.

Savage v. Worsham, 66 Fed. 852.

Carr v. Fife, 44 Fed. 713; affirmed in Carr v. Fife, 156 U. S. 494.

Johnson v. Fleutsch, 176 Mo. 452; 75 S. W. 1006.

Bangs v. Stephenson, 63 Mich. 661, 669; 30 N. W. 317, 320.

Janes v. Wilkinson, 2 Kan. App. 361; 42 Pac. 735,737.

Frisbie v. Whitney, 9 Wall. 187.

The Yosemite Valley Case, 15 Wall. 77.

There are, of course, numerous cases in which the complainant has been held entitled to relief, or an equitable defense has been sustained, where one entitled to public land was deprived of patent thereto by fraud or mistake, or by errors of law on the part of the officers of the Land Department, and thereafter appealed to a court of equity for a decree subjecting the patent title to his superior equitable rights. But, as pointed out in several of the authorities cited above, in every case where such relief has been granted against the patent title, the complainant had performed every act necessary to entitle him to patent, so that nothing remained to be done, as between him and the government, to completely earn the land; every condition precedent to the issuance of patent to him having been complied with before commencement of the suit.

In a sincere effort to exhaust the authorities on the subject, we have examined a great many cases in which the equitable claims of the complainant have been held superior to the patent title; but we have found no such case where anything remained to be done on the part of the complainant to entitle him to patent. Some of the cases may possibly convey a different impression on surface reading; but every such case will be found, upon analysis, to present the conditions indicated. We shall refer to and explain a few of the best known and most cited cases of this character, although these represent a very small proportion of those which have been ex-

amined and which fall within the definition given above.

Johnson v. Towsley, 13 Wall. 72, is probably the leading case. Towsley, the original complainant, entered the land under the preemption law, complied with all the requirements of the law as to residence, cultivation and improvement, made proper final proofs, paid the purchase price, and received the final certificate; so that patent would have been issued to him in the regular course without any further act on his part. His entry was, however, contested by Johnson, who prevailed in the Department and was awarded the patent under a view of the law which the court afterwards held to be erroneous. Towsley remained in possession of the land at all times, and was evidently in possession thereof at the time he brought suit against Johnson. It will be seen, therefore, that Towsley's equitable title was complete, and that nothing whatever remained to be done to entitle him to patent. Cornelius v. Kessel, 128 U. S. 456, and the great case of Lytle v. Arkansas, 9 How. 314, were preemption cases where the conditions were very similar to those considered in Johnson v. Towsley.

Lindsey v. Hawes, 2 Black, 554; McCord v. Hill, 111 Wis. 499, 84 N. W. 27; Bogan v. Edinburgh Land Mortgage Co. (C. C. A. 8th Cir.), 63 Fed. 192; and George v. Riddle, 94 Fed. 689, are cases somewhat resembling Johnson v. Towsley and Cornelius v. Kessel. In each of these cases the complainant complied with all the requirements of law and his proofs and payment were accepted by

the Land Department and final certificate issued to him; but the certificate and entry were afterwards wrongfully cancelled by action of the Department and patent erroneously issued to another.

In Tarpey v. Madsen, 178 U. S. 215, Madsen was the grantee of a railway company, which was entitled to the land under its grant, the Department having erroneously issued patent to a homestead claimant. This court held that patent should have been issued to the railway company, and upheld a decree for Madsen, its grantee. All of the conditions of the grant had been complied with, and the railway company was entitled to patent without any further act on its part.

In Germania Iron Co. v. James, (C. C. A. 8th Cir.) 89 Fed. 811, and James v. Germania Iron Co., (C. C. A. 8th Cir.) 107 Fed. 597, the complainant had entered the land with a Porterfield land warrant. He made proper application, paid the fees required by law, and turned in his warrant; and the application, payment and warrant were duly accepted and the entry allowed by the local land officers. Nothing, therefore, remained to be done to entitle him to patent.

Ard v. Brandon, 156 U. S. 537; Brandon v. Ard, 211 U. S. 11; Duluth & Iron Range Co. v. Roy, 173 U. S. 587; Nelson v. Northern Pacific, 188 U. S. 108; Trodick v. Northern Pacific (C. C. A. 9th Cir.), 164 Fed. 913, Northern Pacific v. Wass, 104 Minn. 411, (now before this court on writ of error), and the very recent case of Osborn v. Froyseth, decided by this court March 14, 1910, are cases of home-

stead claimants who made actual settlement on the land and complied in good faith with all the requirements of law respecting residence, improvement and cultivation, so as to fully earn the land under the homestead law, and who remained in possession of the land at all times up to the commencement of suit. Oregon & California Railway Co. v. United States, 189 U. S. 103, and 116, were cases where the Government brought suit for the benefit of settlers who were in precisely the same position.

In Duluth & Iron Range Co. v. Roy, *supra*, Roy, the claimant, had not completed his full five years residence and cultivation at the time patent was issued to his adversary, and it was held that this was not fatal to his suit; the court declaring that it is not essential that at the moment of time the patent issues, the claimant should have so far completed his performance as then to be immediately entitled to patent. But in that case it appeared that after the patent issued Roy continued to reside upon, cultivate and improve the land, and that the full five-year period elapsed before the suit was commenced; so that *at the time the suit was brought* Roy had fully earned the land under the homestead law. Therefore, the Roy case is right in line with the others cited in the preceding paragraph, and is perfectly consistent with the other authorities referred to in this brief. The Roy case is distinguished upon this general ground in United States v. Chicago, Milwaukee & St. Paul Railway, 195 U. S. 524, 539.

In some of these homestead cases the settler was not permitted to make final proofs, and in one or two cases the settler was deterred by the erroneous action of the officers of the Land Department from filing his preliminary application in the mode prescribed by law. But in all such cases the settler offered or attempted to do the thing omitted, and was prevented from doing so by error of the land officials; and the thing was held immaterial in view of the fact that the claimant had made full compliance with the law in respect to residence, improvement and cultivation, and was then actually occupying the land in good faith as his home. Moreover, the requisite proofs were in fact made as part of the evidence in the suit to establish the rights of the claimant. We think it clear that in each of those cases the claimant had really done everything necessary to entitle him to patent; but if those cases may be regarded as a relaxation of the strict rule, it was a relaxation only in favor of an actual settler who had fully performed the conditions necessary to the acquisition of a home; and reason for this is found in the familiar principle that the law deals tenderly with the settler who in good faith establishes his home upon the public lands and conforms to all the substantial demands of the law, viz: those which call for occupation, cultivation, improvement and continuous residence.

In Morrison v. Stalnaker, 104 U. S. 213, Cunningham v. Ashley, 14 How. 377, and Hess v. Bolinger, 48 Cal. 349, the claimant was a qualified preemptioner who had settled on the land under the pre-

emption law and complied with all the requirements of that law as to residence, improvement and cultivation, and had duly made his final proofs and *tendered* payment of the purchase money, but such tender was refused by the land officials under error of law. In those cases it seems to have been assumed, without discussion, that under the circumstances there shown such tender was equivalent to payment, and the claimant was given relief in equity notwithstanding the tender was not accepted. But in every such case an actual tender of the money was clearly and unequivocally proved, and the claimant was further supported by the fact that he had in all other respects complied with the statute and was an actual settler on the land, which he had cultivated, improved and resided upon in conformity to law, and had made the required proof thereof.

There is as much reason for special leniency towards the actual settler under the preemption law as towards him who claims under the homestead law. The courts have never made any distinction between the two, but have ever shown favor and tenderness towards the rights of both. And this may be the reason why a mere unaccepted tender of payment has sometimes been held sufficient in the case of a preemptioner, just as an unaccepted offer of proofs has been held good in the case of a homesteader, where the complainant was an actual settler in good faith, who had fully satisfied all other conditions, and who was then in residence upon the land.

For we have found no other case where a mere tender of payment or performance has been held sufficient to give the claimant standing to question the patent title. No court, so far as we know, has ever granted this extraordinary equitable relief to a would-be purchaser, not a settler upon the land, who had not paid the purchase money due to the United States under the law, on the ground that payment was excused by tender and refusal. In some cases it is intimated, *obiter dictum*, that tender might be as good as performance to give the status necessary for an attack upon the patent title; but we cannot find that it has ever been so held by any court, except in favor of an actual settler who had in all other respects complied with the law, and then only to the extent indicated in the decisions already cited.

And in no case has anything less than actual affirmative tender of the money been held sufficient to give the complainant the requisite standing against the patent, where his claim was made under a law calling for the payment of a purchase price to the government. The courts have yet to find a cause sufficient to excuse actual tender of the money, in cases where payment is not made and where a right is claimed thereunder as a basis for an attack upon the patent title.

Now we may well concede that even under the timber and stone act, a tender of the purchase money, accompanied by an offer of proper final proofs, which is rejected by the land officials, is enough to give the complainant that privity with the Government which is essential to the maintenance of a suit to control the patent. In this case the complainant Campbell rested upon the rejection of his application, and made no effort whatever to comply with the law with respect to proof and payment. It is not pretended that he made any atttempt to tender the purchase money or the required proofs; nor is it even claimed that he was prevented from doing so by any action of the officials of the Land Department. Indeed, a peculiar weakness of Campbell's case is that there is neither allegation nor proof that he was ever *able* to pay the purchase money or make the necessary proofs.

The theory upon which Campbell proceeds is that, his application having been rejected, it was useless for him to go further; that the rejection of the application indicated that had proofs and payment been tendered the tender would probably have been refused; and that such rejection excused him from making any further offer of payment or performance.

That theory is incorrect in law, as we have shown. It is not at all certain that even a tender of proofs and payment would have been enough to give complainant's claim the required status, but it is perfectly clear that nothing less than an actual tender is sufficient. There is no presumption that the

land officials would not have done their duty—it cannot be assumed, as a matter of law, that they would not have accepted a proper tender properly made. Indeed, if we may conjecture as to the possible event, the acceptance of a similar tender in the Hoyt case makes it seem very probable that such a tender would have been accepted in the Campbell case also. But of course this is immaterial, for the question is not one to be tested by ordinary rules of conduct nor by principles of law applicable to ordinary commercial transactions. It is a question which must be determined in the light of the rules that have been built up for the safety and protection of those holding under patent from the Government; and in the light of those rules it is manifest that complainant has not performed those conditions necessary to give him standing to attack the patent title.

There is nothing in Campbell's situation which entitles him to particular consideration from a court of equity or which furnishes any reason for special leniency towards his failure to perform the prescribed conditions. Campbell was not a settler, but a speculator. He never lived upon the land and never intended to do so. He risked nothing, paid nothing, invested nothing. His only expenditure of time or money has been in the litigation conducted by him in the Department and the courts.

Campbell's position is very different from that of a settler who has spent several years of his life in establishing a home upon a tract of public land, and who has put his savings and the fruit of his labor into buildings and other improvements, and has enhanced the value of the land by clearing and cultivation; especially one who has done this in ignorance of adverse claims and in the honest belief that the land was subject to his entry—which was true of the successful complainant in most of the cases cited above.

Campbell was a mere speculator, and he had full knowledge of the Railway Company's rights. He made his initial application, and conducted his contest in the Department, well knowing that the land had previously been selected by the Railway Company, in the hope that such selection would be defeated in law and the land be subjected to his entry. He went into the venture with eyes open and with full knowledge of its hazards. Had he done so in the honest effort to secure and establish a home, we might feel some sympathy for him. As it is,

he is entitled to no more consideration than any other unsuccessful speculator.

In this connection the language of Mr. Justice Brewer in Moss v. Dowman, 176 U. S. 413, 417, and in Gertgens v. O'Connor, 191 U. S. 237, 246, in each case expressing the unanimous judgment of the court, is especially pertinent. In Moss v. Dowman, Mr. Justice Brewer said:

> "While undoubtedly under the provisions of the statutes and the regulations of the Land Department there are at times opportunities for a speculator to obtain title to public lands, it must be always remembered that *in the eye of the public land laws of the United States the speculator is never an object of favor.*"

And in Gertgens v. O'Connor, he said:

> "It is well to look further into his (the settler's) equities. It will be borne in mind that he did not go on the land until April, 1891. The tract was within the indemnity limits of the company's grant, and was therefore subject to selection. It had been withdrawn from entry under the land laws, and that fact appeared on the records of the local land office. It had in fact been selected by the Company, and that selection had not been cancelled. * * * He does not come within the letter of the statute, nor does he come within the reach of any reasonable equities. *He evidently took his chances on the possibility of the Company's failing to obtain title and a subsequent failure of Ireland to insist upon his preferential right of purchase. He went upon the land with full knowledge of all the facts, which showed that he had no right to enter, speculating upon possibilities which have not been realized, and having so speculated, he cannot complain if he suffer the consequences which often attend the failure of a speculation.*"

In Gertgens v. O'Connor the claimant to whom the quoted language applies was an actual settler who had cultivated and improved the land. The reasoning of that case therefore applies with greater force to a speculator like Campbell, who put nothing at risk and sustains no loss through his failure to acquire the land, except the loss of a profit he might have made.

In Manning v. San Jacinto Tin Co., 9 Fed. 726, 732, cited on a preceding page of this brief, the court said:

> "But complainant has no standing to impeach the transaction on another ground. He has no apparent title from the United States. His right, whatever it may be, is, at best, only inchoate. It is a mere privilege; a first right to purchase or pre-emption right under the acts of Congress, of which he may avail himself or not as he chooses if he should succeed in vacating the patent. *He is not bound to purchase of the Government, and may abandon his claim at any moment. Neither he nor his grantor has ever tendered the purchase money to the United States* or to defendant, or applied for a patent, and it so appears in the bill, and *non constat* that he ever will do either. He is in no better position as regards title, in his relation to the Government, than the parties in Hutton v. Frisbie, and Frisbie v. Whitney, 9 Wall. 187. Complainant as yet has no privity with the government in the lands in dispute, and no ground for equitable relief on that score. Doll v. Meador, 16 Cal. 295."

This language is singularly apposite to the case at bar. Like the complainant in that case, Camp-

bell "has never tendered the purchase money to the United States." Like that complainant, "he is not bound to purchase of the Government, and may abandon his claim at any moment." To give Campbell in this suit the benefit of the patent which was granted by the Government to the Railway Company, under which defendants now hold, is to give him something which he never paid for and never tendered payment for; to give him the benefit of an *option*, a speculation, in which he never put a penny at risk, and from which he might have withdrawn at any time, and may still withdraw, without having invested or lost a dollar, should events occur (such as the destruction by fire of the timber on the land) which would make the speculation appear unprofitable. This is something a court of equity should not do. In this view also, the fact that Campbell has not alleged or proved that he was ever able to pay the purchase money is quite significant.

Campbell cannot complain that there is anything novel in the doctrine which forbids him from maintaining this suit. For years the decisions of the Land Department have marked a clear distinction between the rights of an applicant under the timber and stone law whose application is rejected or suspended, and who makes no further effort to comply with the law, and the rights of one who, notwithstanding such rejection or suspension, offers the proper proof and tenders payment of the purchase money, even though the tender is refused. And those decisions, read in the light of the rule estab-

lished by this court in such cases as Smelting Co. v. Kemp, Bohall v. Dilla, Sparks v. Pierce and Lee v. Johnson, made it absolutely plain that if Campbell would thereafter appeal to a court of equity to subject the patent title to his alleged superior claims, he must establish his status by making the necessary proof and payment, or at least by making an actual unqualified tender thereof. This Campbell did not do, and the omission is fatal to his suit, even if all other questions might be resolved in his favor.

Burns v. Bergh's Heirs, 37 L. D. 161.
Heirs of William Friend, 5 L. D. 38.
Capprise v. White, 4 L. D. 176.
California v. Nickerson, 20 L. D. 391.
Board of Control v. Torrence, 32 L. D. 472.
Jones v. Northern Pacific, 34 L. D. 105, 111.

If there is any seeming harshness in this rule, it is more apparent than real. The remedy of a suit in equity to control the patent title is an extraordinary remedy, which is not founded on statute, but which has been built up by the courts, year by year, decision by decision. It is extraordinary in that it permits re-examination of a final adjudication by the tribunal which is vested with the jurisdction to determine the very questions thus re-examined. And as the courts have built it up by their decisions, so they have defined it and limited its scope. Manifestly, it would not do to extend this remedy to all cases where an individual might find it to his interest to challenge a patent issued to another. Its use must be limited to those having a real and definite interest to be protected; such an interest as courts of equity generally take cognizance of. And so it was established that the remedy might be invoked only by one whose equitable interest was of a dignity equivalent to that of ownership. It was necessary that the line should be drawn somewhere, and it has consistently been drawn against claims which had not been carried far enough to give a right to patent. Again and again it has been held that the patent could be attacked in this manner only by one who was himself entitled to patent. The rule is firmly established, and it has never been departed from. And who shall say that it is not a just and reasonable rule? But whatever may be said with respect to the propriety of the rule—*it is the law!*

In delivering the opinion of the Court of Appeals in the case at bar, Judge Sanborn well said:

> "The indispensable basis of a suit in equity to charge the legal title to land under a patent is an equitable interest in the land in the complainant which is superior to the legal title in the defendant. The right under the general land laws of every qualified citizen to enter any tract of land open to entry thereunder is not, and no one can convert it into, such an interest in land by making an application to purchase which the officers of the Land Department unlawfully deny. The right to allowance of such an application is a privilege merely, and not an equitable interest or title. The applicant acquires no equitable interest in the land by his application and its denial, and in the absence of such an interest no suit in equity can be maintained. * * * The applicant pays nothing for the tract he is refused permission to buy, his loss by the refusal is measurable in damages, he may purchase another tract, *and if courts of equity should entertain suits upon such applications and denials, they would become courts for the production, rather than the prevention, of a multiplicity of suits.*"

In Hartman v. Warren (C. C. A. 8th Cir.), 76 Fed. 157, 164, the same judge, referring to Smelting Co. v. Kemp, 104 U. S. 636, 647, where this principle was first clearly declared, said:

> "This is a wise and salutary rule. It relieves the Government of the expense of vexatious litigation *and the owners of land from the speculative attacks of those who have nothing to lose.* It has been repeatedly announced and uniformly maintained in the federal courts."

The brief to the court on behalf of the complainant Campbell quite ignores the ground upon which the Court of Appeals rested its adverse decision. The reasoning of the Court of Appeals is not referred to in that brief, nor is it suggested that such reasoning was unsound or that the position taken by the Court of Appeals is not sufficiently supported by the authorities cited. The assignments of error which were printed as a part of complainant's brief contain nothing to indicate an intent to reargue in this court the question on which the case was disposed of by the Court of Appeals. Therefore, we are somewhat at loss to know what position complainant's counsel proposes to take.

But from the arguments made to the Court of Appeals, and from the assignments of error filed in that court on the appeal to this court (Record, p. 190), it seems probable that complainant's counsel will argue that if complainant is not entitled to a decree adjudging defendants to hold the patent title in trust for him (and we surmise that this will be conceded in the light of the authorities marshalled above), he is at least entitled to a decree cancelling the patent and permitting him to complete and perfect his entry. This was undoubtedly the theory upon which the suit was brought, since it is the specific relief prayed in the bill of complaint (although it is true that the prayer for general relief would have entitled complainant to a broader decree if warranted by the facts and the law), and it was the theory upon which complainant's counsel presented his case to the Court of Appeals.

But if complainant is not entitled to a decree declaring the patent title impressed with a trust in his favor and requiring the defendants to transfer the title to him, or something of equivalent import, then complainant is not entitled to a decree at all. For it is well settled that a suit to cancel the patent and restore the land to the jurisdiction of the Land Department cannot be maintained by an individual, but only by the Government itself.

The rule is exactly stated by Judge Morrow of the Ninth Circuit in Peabody Gold Mining Co. v. Gold Hill Mining Co., 106 Fed. 241, 243, thus:

> "The mere cancellation of the patent with the reversion of the land to the Government is not within the province of a private party to effect by a suit in equity; that privilege rests only with the Government."

The first case in which this question was discussed seems to be Silver v. Ladd, 7 Wall. 219, 228, where Mr. Justice Miller said:

> "The relief given in this class of cases does not proceed upon the ground of annulling or setting aside the patent wrongfully issued. That would leave the title in the United States, and the plaintiff might be as far from obtaining justice as before. And it may well be doubted whether the patent can be set aside without the United States being a party to the suit. The relief granted is founded on the theory that the title which has passed from the United States to the defendant, inured in equity to the benefit of plaintiff, and a court of chancery gives effect to this equity."

In Smelting Co. v. Kemp, 104 U. S. 636, 647, Mr. Justice Field said:

> "It does not lie in the mouth of a stranger to the title to complain of the act of the Government with respect to it. If the Government is dissatisfied, it can on its own account authorize proceedings to vacate the patent or limit its operation."

In Steel v. Smelting Refining Co., 106 U. S. 447, 454, the same great judge stated the point clearly in the following terms:

> "The remedy of the aggrieved party must be sought by him in a court of equity, if he possesses such an equitable right to the premises as would give him the title if the patent were out of the way. If he occupy with respect to the land no such position as this, he can only apply to the officers of the Government to take measures in its name to vacate the patent or limit its operation. * * * This can be accomplished only by regular judicial proceedings taken in the name of the Government for that special purpose."

In Lee v. Johnson, 116 U. S. 48, he said:

> "He (the plaintiff) must in all cases show that but for the error or fraud or imposition of which he complains he would be entitled to the patent; it is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the Government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued."

In Carr v. Fife, 44 Fed. 713, affirmed in Carr v. Fife, 156 U. S. 494, Judge Hanford said, of a suit of similar nature:

> "This is not a suit to destroy the title conveyed by the patent. The plaintiff's object is rather to acquire that title for himself. Unless he can succeed in this, it matters naught

to him in what manner or to whom the Government disposes of the land."

The most recent authority is Jameson v. James, 100 Pac. 700, decided by the Supreme Court of California in March, 1909, which has already been cited in another connection. That case is exactly in point. The plaintiffs had initiated a mineral claim to the land in dispute, and had in all respects complied with the law up to the time patent was issued to the defendant; but they had not made the complete compliance necessary to entitle them to patent. It appeared that the patent was obtained by fraud and in derogation of the rights of the plaintiffs. After examining the facts and authorities, the court concluded that the plaintiffs had not made such compliance with the law as to entitle them to control the patent title within the rule of cases like Bohall v. Dilla, Sparks v. Pierce, Lee v. Johnson, and Smelting Co. v. Kemp, *supra*, and then considered whether the plaintiffs were entitled to have the patent set aside in order that they might complete their claims—which was the relief prayed in the complaint. In this connection the court said:

"In the case at bar the plaintiffs do not seek to have the defendants held as trustees of the legal title conveyed by the patent. * * * It is not claimed by appellants (plaintiffs) that they * * * occupied 'such a status as entitled them to control the legal title.' They had never performed the acts necessary to vest in them the right to a patent. * * * The plaintiffs, then, not being themselves entitled to acquire title to the land, ask that the patent conveying it to defendant James be cancelled.

> That a patent obtained by fraud may be so cancelled is well settled; but inasmuch as the party injured by the fraud is the Government, whose title has been improperly obtained, *the action to annul the patent can be maintained by the United States alone.* A complainant in the position of these plaintiffs must, as is said in Steel v. St. Louis Smelting Co., (106 U. S. 447,) 'apply to the officers of the Government to take steps in its name to vacate the patent or limit its operation. This can be accomplished only by regular judicial proceedings taken in the name of the Government for that special purpose.' "

It is suggested in one of the briefs that the decision of the Court of Appeals in the Hoyt case rests upon the ground that the acceptance of Hoyt's application, proof and payment deprived the Department of jurisdiction, and that the subsequent approval of the Railway's Company's selection and the issue of patent to it were without jurisdiction and absolutely void. Now if the patent to the Railway Company were void for want of *jurisdiction* in the Department to issue it, it might be attacked collaterally or in an action at law; it is only a patent for land over which the Department had jurisdiction that is impervious to collateral attack and cannot be questioned except by direct proceeding in equity at the suit of one who is himself entitled to patent. And while it is not claimed that the decision in the Hoyt case involves a ruling that the Department was without jurisdiction to approve the selection and issue the patent to the Railway Company in the Campbell case, so that the

question is really immaterial in this case, it may possibly cause some misunderstanding; and as it is easily disposed of, it seems best to get it out of the way.

We do not think the Court of Appeals can rightly be understood to have put its decision upon the ground indicated; indeed, it seems to us that this idea is expressly excluded by the language of the opinion itself. See Hoyt v. Weyerhaeuser, 161 Fed. 324, 330. At all events, the theory that the Department can be deprived of jurisdiction by the acceptance of proofs and payment on a claim of this character, or by anything short of the issue of patent itself, is wholly incorrect. It is uniformly held that wherever the Department is vested with authority to receive, consider and pass upon the claims of applicants to a tract of public land, it is deemed to have jurisdiction thereof; and this is only another way of saying that the Department has jurisdiction over all land constituting a part of the public domain which has not been reserved, withdrawn or previously granted by authority of Congress. And when the jurisdiction of the Department has once attached, it continues until patent has issued. The issuance of patent, or the certification which is the equivalent of patent, is the act which terminates the jurisdiction of the Department. Therefore, in any case where the Department passes upon the conflicting claims of applicants for a tract of public land, and awards patent to one of them, its action, however erroneous, wrongful or mistaken; however arbitrary or con-

trary to law; is nevertheless a judgment within its jurisdiction, which is impervious to collateral attack and which can be challenged only by direct proceeding in equity.

Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592.

United States v. Schurz, 102 U. S. 378, 402.

Orchard v. Alexander, 157 U. S. 372, 383.

Brown v. Hitchcock, 173 U. S. 473, 477.

Hawley v. Diller, 178 U. S. 476, 488.

King v. McAndrews, (C. C. A. 8th Cir.) 111 Fed. 860, and cases cited.

II.

THE RAILWAY COMPANY'S SELECTION, HAVING BEEN ACCEPTED AND ALLOWED BY THE LOCAL LAND OFFICERS, SEGREGATED THE LAND AGAINST COMPLAINANT'S APPLICATION TO ENTER THE SAME, SO THAT NO RIGHTS ATTACHED UNDER THAT APPLICATION, REGARDLESS OF THE VALIDITY OR INVALIDITY OF THE PRIOR SELECTION.

If the Circuit Court of Appeals was right in holding that complainant is not in position to attack the patent title under which defendants claim, because of his failure to perform the acts necessary to put him in privity with the United States, then his appeal was properly dismissed, even under the theory that the officers of the Land Department erred in rejecting his application to enter the land in controversy. But suppose we pass over that all-sufficient ground of defense and concede that complainant would be entitled to a decree if it could be held that the rejection of his application was an error of law. Under such a concession the case resolves itself into this question: Was the land in suit open to entry and acquisition under the timber and stone act at the time complainant offered his application to purchase the same, and was it then the duty of the officers of the Land Department to accept such application and permit entry and purchase thereunder, notwithstanding the prior selection by the Railway Company?

The Court of Appeals answered that question in the affirmative in the Hoyt case, on the supposed

authority of Sjoli v. Dreschel, 199 U. S. 564. But there is a rule of law not considered in the Hoyt case nor touched upon in Sjoli v. Dreschel which compels a contrary conclusion in the present case. That is the rule, firmly established by the decisions of this court as well as by numerous decisions of the Land Department and of other Federal and state courts, that an entry or selection of public land, accepted or recognized by the local land officers, segregates the land, and so long as it remains uncancelled of record, precludes the initiation of any other claim thereto; whether such entry or selection is regular or irregular, valid or void.

In this case the Railway Company made and filed its application to select the land, and paid the required fees, in exact accordance with the departmental practice and regulations in force at the time, and the same was accepted, approved and allowed by the local officers. This selection stood upon the records, intact and uncancelled, at the time complainant presented his application to purchase the land under the timber and stone act. Therefore, it constituted a complete barrier against complainant's attempt to acquire the land, and his application was rightly rejected by the land officers, even if every objection which complainant now makes against the validity of the Railway Company's selection were conceded to be well-founded in law. Nor could any right, priority or other advantage accrue to him by virtue of that application in case the Railway Company's selection was afterwards cancelled—an application submitted under such

conditions is a mere nullity, and nothing can be built upon it.

The latest declaration by this court of the rule here invoked is found in McMichael v. Murphy, 197 U. S. 304, and Holt v. Murphy, 207 U. S. 407, both of which cases involved the same land. The facts in those cases were these: On April 23, 1889, one White was permitted to make homestead entry of the land. Subsequently, two other parties attempted to enter the land, and on July 16, 1889, in a contest before the local land officers, it was held that all three claimants were disqualified because of their violation of the proclamation opening the tract to settlement, and that White's entry should be cancelled. An appeal was taken to the Commissioner of the General Land Office, who, on March 7, 1890, affirmed the ruling of the local officers and held White's entry for cancellation. White appealed to the Secretary of the Interior, who, on July 21, 1891, affirmed the decision of the Commissioner. McMichael settled on the land on June 3, 1889; and on July 21, 1889, he made application to enter it under the homestead law, but his application was rejected for conflict with White's entry. This was after the decision of the local officers holding White's entry for cancellation, but prior to the decision of the Commissioner on appeal. Again on August 31, 1889, McMichael made application to enter the land, and this second application was received, but "suspended" to await the result of the contest between White and the other claimants. On March 11, 1890, after the de-

cision of the Commissioner cancelling White's entry, and before the appeal to the Secretary from that decision was taken, although within the time allowed by law for such appeal, Holt filed a soldier's declaratory statement for the land, which was "suspended" by the Register and Receiver pending final action on White's appeal. Afterwards, on November 29, 1890, while the appeal was pending and before decision thereon, White filed a relinquishment of his entry, and Murphy immediately made a homestead entry on the land. After considerable litigation before the Department, Murphy was awarded the patent. McMichael brought suit in equity to have Murphy adjudged trustee of the patent title for his benefit; but a decision in favor of Murphy was affirmed by this court in McMichael v. Murphy, supra, and a similar suit brought by Holt was disposed of in Murphy's favor in Holt v. Murphy, supra.

It will be observed that White's entry was cancelled for an infirmity existing at the time the entry was made, viz: disqualification on White's part to make the entry, and that it had been held for cancellation by the local officers before McMichael's application was filed, and by the Commissioner before Holt tendered his declaratory statement. Moreover, Holt's statement was not rejected by the local officers, but was "suspended pending final action on the appeal"; so that if the filing of an application under such conditions could give any right or priority to the applicant, Holt's claim would have been protected as against the subse-

quent entry by Murphy. The same thing is true of McMichael's second application. Nevertheless, it was held that neither McMichael nor Holt acquired any rights under their applications.

In the opinion in the McMichael case, Mr. Justice Harlan says (page 311):

> "While the entry remained uncancelled of record, by any direct action of the land office or by relinquishment, could another person, by making an entry, acquire a right in the land upon which a patent could be based? If not, then McMichael acquired no right by his entry or application to enter. * * * McMichael's entry having been made at a time when White's entry remained uncancelled, or not relinquished, of record, conferred no right upon him for the reason that White's entry, so long as it remained undisturbed of record, had the effect to segregate the lands from the public domain and make them not subject to entry. On White's relinquishment, they again became public lands subject to the entry made by Murphy. In addition it may be observed that the action of the Land Department under the statutes relating to the public lands has been in line with the above views. This appears from the decision in Hodges v. Colcord, and from the opinion of the Secretary of the Interior in McMichael v. Murphy, 20 L. D. 147. It is our duty not to overrule the construction of a statute upon which the Land Department has uniformly proceeded in its administration of the public lands, except for cogent reasons."

In the opinion in the Holt case, Mr. Justice Brewer says (page 412):

> "The Supreme Court, however, rested its decision largely upon this rule of law: That whenever an entry has been made of a tract of land, that tract is segregated from the mass

of public land subject to entry until the existing entry is disposed of. Counsel for appellant do not question the general rule as to the effect of an entry regular upon its face, and concede that it is no longer open to doubt in view of the many rulings of the Land Department and the decisions of this Court. Hodges v. Colcord, 193 U. S. 192, McMichael v. Murphy, 197 U. S. 304, the latter involving the land in controversy. But they seek to distinguish this case in that the local land officers had held all the claimants disqualified, and that on appeal the Commissioner of the General Land Office, on March 7, 1890, had affirmed their ruling * * * and held the entry of White for cancellation; that the application of Holt to enter was made on March 11, 1890, before any appeal had been in fact taken from the decision of the Commissioner to the Secretary of the Interior—in other words, at the time that Holt applied to make his entry there was no pending entry. It could not have been foretold whether White would appeal from the decision of the Commissioner of the General Land Office, and if he did not there would be no entry to conflict with Holt's application. They contend that the application of Holt should have been recognized as an application to enter the land to take effect if White should not appeal from the decision of the Commissioner, or if on appeal that decision should be sustained. In that way Holt would have been given priority over all subsequent entries."

The learned Justice then considers, discusses and quotes from a number of the Land Department decisions, concluding with the following quotation from Stewart v. Peterson, 28 L. D. 515:

> "That this important matter of regulation may be perfectly clear, it is directed that no application will be received nor any rights recognzed as initiated by the tender of an appli-

> cation for a tract embraced in an entry of record, *until said entry has been cancelled upon the records of the local office.*"

And he says further:

> "Hence, by this rule, which was in force at the time the patent was issued, the appellant took no rights, preferential or otherwise, by the declaratory statement filed in March, 1890. Such a rule, when established in the Land Department, will not be overthrown or ignored by the courts, unless they are clearly convinced that it is wrong. So far from this being true of this rule, we are of opinion that to enforce it will tend to prevent confusion and conflict of claims."

Hodges v. Colcord, 193 U. S. 192, cited by this court in the McMichael and Holt cases as authority for those decisions, was another Oklahoma case of the same general character as the McMichael and Holt cases, where the same conclusion was reached; although that case did not present some of the special circumstances of the later cases. Other decisions illustrating and applying different phases of the same general principle are:

Hastings & Dakota Railroad Co. v. Whitney, 132 U. S. 357.

Sturr v. Beck, 133 U. S. 541, 548.

Whitney v. Taylor, 158 U. S. 85, 93.

Kansas Pacific Railroad Co. v. Dunmeyer, 113 U. S. 629, 644.

Witherspoon v. Duncan, 4 Wall. 210, 218.

Neff v. United States, (C. C. A. 8th Cir.) 165 Fed. 273, 281.

James v. Germania Iron Co., (C. C. A. 8th Cir.) 107 Fed. 597.

In the three Oklahoma cases the invalidity of the entry consisted of the disqualification of the entryman, and did not appear on the face of the record of such entry; and some emphasis is put, in the opinions, on the fact that the entry was "prima facie valid." But in Hodges v. Colcord the court refers with express approval to the language of Mr. Justice Lamar in Hastings & Dakota Railroad Co. v. Whitney, 132 U. S. 357, where he said:

> "Under the homestead law three things are needed to be done in order to constitute an entry on public land: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered. If either one of these integral parts of an entry is defective, that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards cancelled on account of these defects by the Commissioner or on appeal by the Secretary of the Interior. * * * *But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain.*"

This language also received explicit approval in Sturr v. Beck, 133 U. S. 541, 549.

Now defects of the character defined in the foregoing quotation are such as appear upon the face of the record of the entry, and in such cases the validity or invalidity of the entry may be determined without reference to matters dehors the record. Nevertheless, in those cases, as well as in cases where the infirmity in the entry depends upon parol testimony and does not appear upon the record itself, it is held that where the entry has been accepted and allowed by the local land officers it effects a segregation of the land, and precludes the inception of any other rights thereto so long as such entry remains uncancelled.

Most of the cases cited above deal with homestead or preemption entries. But the rule is precisely the same in the case of a railroad indemnity selection or a selection under any of the lieu selection acts. This is well settled by the rules and decisions of the Land Department.

In the case of Southern Pacific Railroad Co., 32 L. D. 51, 53, the Secretary said:

> "A railroad indemnity selection, presented in accordance with departmental regulations and accepted or recognized by the local officers, *has been uniformly recognized by the Land Department as having the same segregative effect as a homestead or other entry made under the general land laws.*"

The foregoing language is quoted with approval in Santa Fe Pacific Railroad Co., 33 L. D. 161, 162, where the Secretary says further:

> "A pending selection list is therefore given *the same force in segregation of the land as an actual entry*, and lands so conditioned are within the rule fixed by circular of July 14, 1899, 29 L. D. 29."

The circular last above referred to contains the language which, in Holt v. Murphy, supra, Mr. Justice Brewer quoted approvingly from Stewart v. Peterson, 28 L. D. 515, viz:

> "In accordance with departmental instruction in the case of Stewart v. Peterson, 28 L. D. 515, it is hereby directed that no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been cancelled upon the records of the local office."

In Santa Fe Pacific Railroad Co. v. Northern Pacific Railway Co., 37 L. D. 593, 596, the question was whether certain unapproved indemnity selections by the Northern Pacific Company segregated the land as against certain lieu selections proffered by the Santa Fe Pacific Company, and the Secretary said:

> "This contention may be disposed of by reference to the instructions contained in the circular of July 14, 1899, 29 L. D. 29, which are to the effect that no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record until such entry has been cancelled upon the records of the local land office. The term 'entry' as used in this circular has been construed uniformly to include any claim under the public land laws, which operates to segregate the land applied for from the public domain. The rule was promulgated in the interest of good administra-

tion, and it has been uniformly followed since its promulgation. Inasmuch as the record shows that the selections of the Northern Pacific Railway Company had not been cancelled at the time of the applications submitted by the Santa Fe Pacific Railway Company, it follows that the latter's selections were properly rejected."

In Eaton v. Northern Pacific Railway Co., 33 L. D. 426, it was said:

"What was the status of Eaton's claim to this land on January 1, 1898? He had not at that time initiated a claim by settlement, entry, or purchase. He had, as before shown, on October 26, 1895, applied to purchase the land under the timber and stone act, which application had been rejected for conflict with the pending indemnity selection by the railroad company. * * * *So long as the railroad indemnity selection remained intact, the land embraced therein was not subject to entry or purchase under the timber and stone act, and no right or claim could be initiated by an application for such entry or purchase.* * * * It is true that during the pendency of his appeal the railroad selection was canceled under a decision of this Department since held by the Supreme Court to have been erroneous, but this cancellation was not in any way attributable to his appeal, and it has been repeatedly held that an appeal from the action of the local officers properly rejecting an application because the land described therein is not at the time subject to entry, confers no right upon the applicant, even though the land becomes subject to entry during the pendency of the appeal."

See also:

Porter v. Landrum, 31 L. D. 352, 353.

Santa Fe Pacific Railroad Co. v. State of California, 34 L. D. 12.

George Hoge, 9 L. D. 332.
Thomas v. Spence, 12 L. D. 639.
Gallup v. Welch, 25 L. D. 3.

Aside from the authority of these decisions, which are in themselves controlling, there can be no logical distinction between an entry under the preemption or homestead law and a selection duly accepted and approved by the local officers. The term "entry" has been frequently defined, and in various terms, but it has never been held to comprehend anything more than a proper application, accompanied by affidavit when required, payment of the prescribed fees, and allowance by the local officers. It does not involve settlement upon the land itself, nor any recognition by the government beyond the action of the local officers. And a railroad indemnity selection, before approval by the Secretary, has every characteristic of an entry thus defined. It comprehends an application to select the lands, verified by affidavit and submitted according to the regulations of the Department, payment of the prescribed fees, and acceptance and allowance by the local officers. These elements are all present in the case at bar.

Hastings & Dakota Railroad Co. v. Whitney, supra.

Chotard v. Pope, 12 Wheat. 586.

Lockwitz v. Larson, 16 Utah, 275, 52 Pac. 279.

We have said that the settled rule of the Department to this effect should be taken as controlling. This is so under the familiar doctrine that the con-

struction given by the Department to a statute which it is charged with the duty of executing, and its rulings upon questions of practice and procedure in matters under its supervision, are entitled to great respect, and ought not to be disturbed except for the most cogent reasons.

Holt v. Murphy, supra.

McMichael v. Murphy, supra.

Hastings, etc., Railroad Co. v. Whitney, supra.

United States v. Moore, 95 U. S. 760.

United States v. Burlington, etc., Railroad Co., 98 U. S. 334, 341.

Heath v. Wallace, 138 U. S. 573, 582.

United States v. Alabama, etc., Railroad Co., 142 U. S. 615, 621.

Orchard v. Alexander, 157 U. S. 383.

Hewitt v. Schultz, 180 U. S. 139, 156, 163.

Louisiana v. Garfield, 211 U. S. 70.

Again, the rule that an ordinary entry effects a segregation of the land is entirely built up upon departmental regulations and decisions—it is not based upon statute, nor, in the first instance, upon decisions of the courts. So, too, the rule that a railroad indemnity selection, allowed by the local officers, has the same segregative effect as a homestead entry, is likewise an outgrowth of departmental rules and decisions. Both rules have the same source, depend upon the same principles, and have the same practical justification. One finds as much support in reason, practical justice, and convenience of administration, as the other. Both give the same effect to substantially similar acts.

If one can be sustained, as the rule with respect to an entry has been sustained by this court, it is not possible to draw a distinction against the rule which gives like effect to a selection.

But complainant may argue that by the action of the Commissioner of the General Land Office in 1897, based upon the erroneous ruling of the Secretary that Duluth was the eastern terminus of the Northern Pacific Railroad, the Railway Company's selection was, in effect, cancelled; and hence that the segregative effect of the prior selection was destroyed or suspended during the time which intervened between such action and reinstatement of the selection; and consequently at the time when complainant "renewed" his application in December, 1897.

In order to simplify the question, we may concede that this action of the Commissioner amounted to a cancellation of the selection, and that thenceforth, until reinstatement, the selection had no segregative effect; so that if complainant's original application had been filed during that period, the defense that the land was segregated as against such an entry, regardless of the validity of the selection, would not be available to defendants.

The record leaves some uncertainty as to the precise time when this cancellation was effected, but it seems quite plain that it was done pursuant to the Commissioner's order of July 17, 1897, and that it was therefore subsequent to that date.

(Record, pp. 15-16) However, it could not have been earlier than January, 1897, in any possible view; and it is quite immaterial whether the cancellation was made in January or July of that year.

Complainants original application was filed October 26, 1895. The allegations of his bill with respect to the presentation of this application are quite full, and most of them are admitted in the answer or are established by proof. But the allegations of the bill with respect to his action in December, 1897, are very meager, and none of such allegations are admitted in the answer, nor is there a scintilla of evidence to support them. The bill alleges that on December 28, 1897, complainant "did again renew his application to purchase said land, and again the local officers refused to allow" the application, but "received and filed" the same and "forwarded the same to the Commissioner of the General Land Office." A copy of the paper is annexed to the bill, and there are some allegations as to its *contents.* (Record, pp. 4-5, 28-30.)

The bill contains no allegation, in substance or effect, that in December, 1897, complainant possessed the requisite qualifications, or that he paid or offered to pay the fees required by law to be paid upon such an application. As stated, there is no proof whatsoever upon the subject of this "renewal" of the application; and as the answer contains no admission on the subject, it was incumbent upon complainant to make proper proof. Moreover, complainant did not appeal from the action

of the local officers on this December application, and no notice was taken of it in any of the subsequent proceedings in the General Land Office or before the Secretary.

In short, it is perfectly plain that complainant abandoned this 1897 application, and elected to rely upon his original application of October, 1895. Complainant has evidently sought to maintain the integrity of his original application and to rest his case on that, taking what advantage he could from the allegation that this application was "renewed" in December, 1897. But an examination of his pleading and the attached exhibits (Record, pp. 4-5, 28-30) makes it apparent that the proceeding in December, 1897, was either a new application, or it was nothing at all; and that if complainant ever acquired any rights thereunder they have long since been abandoned and lost. Complainant having elected to stand on the first application; having acquiesced, without appeal, in the rejection of the 1897 application by the local officers; and having abandoned the later proceeding so far as his proofs in this case are concerned; cannot now claim any advantage thereunder, even if the allegations of his bill were such as to present the matter fairly.

This question as to the segregative effect of the Railway Company's selection was not involved in Sjoli v. Dreschel, 199 U. S. 564, at all; and hence that case is not authority in the present case in any possible view.

In that case Sjoli, the homestead claimant, settled on the land in 1884, and resided thereon continuously until patent was issued to him in 1901. The Railway Company made no attempt to select the land until 1885, a year or more after Sjoli's settlement. The Department at first rejected Sjoli's application, but subsequently decided in his favor, cancelled and disallowed the Railway Company's selection, and awarded the land to Sjoli, and patent was accordingly issued to him. Therefore, at the time Sjoli initiated his settlement the land was a part of the unappropriated public domain, open to his entry, and at the time his entry was finally allowed by the Department the Railway Company's selection was cancelled of record. Whatever view may be taken of the decision in Sjoli v. Dreschel as applied to a situation like that which exists in the Hoyt case, where an entry under the timber and stone act was allowed and approved and payment accepted, although conditionally, at a time when the Railway Company's selection stood cancelled upon the records of the land office under a decision of the Department afterwards held by this court to be erroneous, it can have no bearing on the present case, where complainant's application to enter the land was made while the prior selection by the Railway Company stood of record, uncancelled and intact.

III.

WHEN THE RAILWAY COMPANY'S SELECTION WAS FINALLY APPROVED BY THE SECRETARY OF THE INTERIOR, AND PATENT ISSUED TO IT FOR THE LAND, THE APPROVAL AND PATENT RELATED BACK TO THE DATE OF THE ORIGINAL SELECTION, AND CUT OFF ALL INTERVENING CLAIMS.

This proposition is the principal issue in the Hoyt case, and is very thoroughly discussed in Mr. Bunn's brief. We do not propose to go over the whole question, but only to present our views on a few of the phases which it takes. And we shall deal with it as a proposition independent of the rule that a selection allowed by the local officers segregates the land against other entries, whether the selection be valid or not—assuming, for the purposes of this branch of the discussion, that in order to defeat the complainant's claim it must appear that the selection was in all respects regular and valid, and entitled the Railway Company to the land selected, and that such selection was followed by approval and patent.

We submit that there would be no room for argument upon this proposition if it were not for certain language found in the opinion of this court in Sjoli v. Dreschel, 199 U. S. 564. And it is not what is *decided* in that case, but what is *said* in the opinion, that is responsible for the doubt which has arisen. In this connection it seems to us that the language of Mr. Justice Harlan (who delivered the opinion in Sjoli v. Dreschel) in the recent case of

Kuhn v. Fairmont Coal Co., 215 U. S. 349, is especially pertinent. The learned Justice said:

> "It has been suggested—and the suggestion cannot be passed without notice—that the views we have expressed herein are not in harmony with some recent utterances of this court, and we are referred to East Central Eureka Min. Co. v. Central Eureka Min. Co., 204 U. S. 266, 272. That case involved, among other questions, the meaning of a deed for mining property. This court, in its opinion, referred to a decision of the state court as to the real object of the deed, and expressed its concurrence with the views of that court. That was quite sufficient to dispose of the case. But in the opinion it was further said: 'The construction and effect of a conveyance between private parties is a matter as to which we follow the court of the state'—Citing Brine v. Hartford F. Ins. Co., 96 U. S. 627, 636; De Vaughn v. Hutchinson, 165 U. S. 566. *Even if the broad language just quoted seems to give some support to the contention of the defendant, it is to be observed that no reference is made in the opinion to the numerous cases,* some of which are above cited, holding that the Federal court is not bound, in cases between citizens of different states, to follow the state decision, if it was rendered after the date of the transaction out of which the rights of the parties arose. *Certainly there was no purpose on the part of the court to overrule or to modify the doctrine of those cases; and the broad language quoted from East Central Eureka Min. Co. v. Central Eureka Min. Co. must therefore be interpreted in the light of the particular cases cited to support the view which that language imports.*"

Let us apply to the interpretation of the opinion in Sjoli v. Dreschel the principles invoked by the court in the foregoing quotation. We may concede

that the "broad language" of that opinion supports the contention of complainant in this case, and the decision of the Court of Appeals in the Hoyt case, to the effect that the Railway Company's selection, although regular and valid in and of itself, did not bar an entry of the land under the timber and stone act, where application for such entry was made prior to approval of the selection by the Secretary of the Interior. But we submit that under the principles applied in Kuhn v. Fairmont Coal Co. this broad language must be interpreted "in the light of the particular cases cited to support" the decision in Sjoli v. Dreschel, and in the light of the fact that no reference is made in that opinion to the numerous cases holding a contrary doctrine.

Now the case before the court in Sjoli v. Dreschel was that of a homestead claimant who had settled on the land in 1884, prior to any selection or attempted selection thereof by the Railway Company, and who continued to reside thereon, complying with all the requirements of the homestead law, at all times after the date of such settlement. The Railway Company filed its selection list in 1885. After prolonged litigation in the Department the railroad selection was disapproved by the Secretary and patent was issued to Sjoli, the homestead claimant. But the land was included in a withdrawal made by the Secretary some time previous to Sjoli's settlement thereon, in aid of the Railway Company's indemnity rights; and one of the questions in the case was whether that withdrawal, made in advance of selection, prevented the attaching of rights under Sjoli's settlement.

The particular cases cited in Sjoli v. Dreschel fully sustain the point actually decided; but we respectfully submit that not one of them furnishes support for the broad language of the opinion; at least in the application given that language by the Court of Appeals in the Hoyt case.

Hewitt v. Schultz, 180 U. S. 139, Menotti v. Dillon, 167 U. S. 703, Cedar Rapids & Missouri River Railway Co. v. Herring, 110 U. S. 27, Northern Pacific v. Miller, 7 L. D. 100 and Northern Pacific v. Davis, 19 L. D. 87, were all cases involving railroad indemnity selections, where the settlement antedated the selection.

Nelson v. Northern Pacific, 188 U. S. 108, Spicer v. Northern Pacific, 10 L. D. 440, Northern Pacific v. McCrimmon, 12 L. D. 554, and Northern Pacific v. Plumb, 16 L. D. 80, were cases involving land within the place limits of the Northern Pacific grant where settlement was made before definite location of the railroad, and the question was as to the effect of a withdrawal before settlement.

Northern Pacific v. Sanders, 166 U. S. 620, involved mineral selections made before definite location of the railroad and before any attempt to select.

United States v. Northern Pacific, 152 U. S. 284, United States v. Oregon & California Railroad, 176 U. S. 28, St. Paul & Pacific v. Northern Pacific, 139 U. S. 1, St. Paul & Sioux City Railroad v. Winona & St. Peter Railroad, 112 U. S. 720, Kansas Pacific v. Atchison, Topeka & Santa Fe, 112 U. S. 414, and Missouri, Kansas & Texas Railway Co. v. Kansas

Pacific Railway Co., 97 U. S. 491, are cases involving conflicting railroad grants, in none of which were the rights of individual entrymen considered; and none of these latter cases has any direct bearing upon the particular point now under discussion.

In Grinnell v. Railroad Co., 103 U. S. 739, the decision was in favor of the railroad company, but the court suggests the query whether the claim of the railroad company to selected lands would be superior to an entry made prior to selection.

Wilcox v. Eastern Oregon Land Co., 176 U. S. 51, is another case where the decision was in favor of the railroad company, and there is nothing suggesting a doubt as to the priority of an indemnity selection made previous to adverse entry.

Resser v. Carney, 52 Minn. 397, is a case which applies the well settled principle that no title vests under an indemnity selection until approval by the Secretary, and no question of priority is involved.

Musser v. McRae, 38 Minn. 409, is an earlier decision in the case reported under the same title at 44 Minn. 343. The plaintiffs, holding under conveyance from the company, sued to recover for timber cut from land within the indemnity limits of a Wisconsin railroad grant; but on the first trial they made no effort to prove that the land had been selected, or the selection approved, nor did they show any patent from the United States. The court held that the plaintiffs had failed to prove title sufficient to support an action for trespass; and the language quoted from that case in Sjoli v. Dreschel was used with reference to that omission. All this is explain-

ed in the opinion on the second appeal (Musser v. McRae, 44 Minn. 343) which is one of the authorities relied upon in support of our position. On the second trial the missing proof was supplied; and, the date of selection being established, the court held that the patent related back to the date of the filing of the selection list, so as to permit recovery for timber cut from land between the date of selection and the date of the Secretary's approval thereof.

Aside from the fact that none of the authorities cited in Sjoli v. Dreschel support the broad language of the opinion in the application given it by the Court of Appeals in the Hoyt case, we venture the statement, which we put in italics for greater emphasis, that:

Prior to the decision in Sjoli v. Dreschel it was never held or declared by any court or in any decision of the Land Department that the rights acquired under a railroad indemnity selection, properly made, of land then subject to such selection, where that selection was subsequently approved by the Secretary of the Interior in due course, could be defeated by an entry, settlement or other claim initiated after the date of such selection, although before approval thereof.

Nor has it been so held in any case since the decision of Sjoli v. Dreschel, except by the Court of Appeals in the Hoyt case, and by the Supreme Court of Minnesota in Northern Pacific v. Wass, 104 Minn. 411, and in Houston v. Northern Pacific, (Minn.) 123 N. W. 922,—cases decided by courts

which considered themselves bound by the language of the Sjoli case. In some other cases in this and other courts the language of Sjoli v. Dreschel has been cited or quoted, but in none of these latter cases has it been applied in the sense it is here considered. For instance, Brandon v. Ard, 211 U. S. 11, is an echo of the old case of Ard v. Brandon, 156 U. S. 537, where settlement on the land antedated the inception of the railroad company's rights; and Osborn v. Froyseth, decided by this court March 14, 1910, was a case where, as in Sjoli v. Dreschel, a homestead claimant settled on the land long prior to the first valid selection by the railway company, although in that case there had been an earlier selection adjudged invalid and cancelled by the Land Department, upon which it was held no rights could be predicated.

Indeed, if the decision in Osborn v. Froyseth is carefully considered it will be found at least inferential authority for our position. If it were the law that the rights of a claimant settling on the land at any time before approval by the Secretary are superior to rights under an indemnity selection, there would have been no occasion for the discussion and consideration given that case, nor for the marked emphasis put upon the fact that the homestead claimant settled on the land prior to any valid selection thereof. For in that opinion Mr. Justice Lurton said:

> "The plain effect of the settlement made upon the land here in controversy before any valid selection of the same land by the railroad company, under its grant, was to initiate

a homestead right. That settlement and possession continued from the time it was first made, and when, in October, 1891, the Hastings and Dakota Railroad, or its successors in title, attempted to select that land as indemnity land, the land in question was in the actual occupancy of Froyseth claiming it as a homestead. It had, by such settlement, been segregated from the lands subject to selection, and in a contest between such a homesteader and those claiming under selections subsequently made of lieu lands the claim of the former is the better claim. * * * But it is urged that the original selection made May 26, 1883, was valid, and operated to vest the title as of that date in the railroad company. * * * The rejection by the Secretary of the Interior of the selection made in 1883 is fatal to any claim now made to carry back the title of the plaintiff in error to that selection. * * * Thus, if either preemption or homestead rights had been initiated before such selection, the parcels to which such right had attached were not subject to appropriation as indemnity lands. * * * But it is urged that the mere fact that there was no record evidence of the homestead claim when the selections of 1891 were made was enough to give efficacy to that selection and vest the legal title under the patents thereafter issued. But this is answered by what we have already said, namely, that if at that date this land was actually occupied by one qualified under the law, who had entered and settled thereon before that time, with the intent to claim it as a homestead, the land had ceased to be public land and as such subject to selection as lieu land."

This case of Osborn v. Froyseth also supplies a sufficient answer to the suggestion that the rule deduced from the broad language of the opinion in Sjoli v. Dreschel was necessary to the decision in

that case, for the reason that Sjoli did not file his application to enter the land as a homestead until long subsequent to the selection thereof by the Railway Company, although his settlement thereon preceded such selection. The same conditions existed in Osborn v. Froyseth; and the court points out that "under the act of May 14, 1880, (ch. 89, 21 Stat. 141, sec. 3) the right of one settling in good faith for the purpose of claiming a homestead relates back to the date of settlement"; also that where the land is, at the time of selection, in the occupancy of an actual settler who intends in good faith to claim the land as a homestead, such occupancy removes the land from the category of land subject to indemnity selection; and an attempted selection thereof is ineffectual, without regard to whether the settler subsequently perfects his homestead claim. These propositions are fully sustained by St. Paul, Minneapolis & Manitoba Railway Co. v. Donohue, 210 U. S. 21, 31, which is cited in that connection in Osborn v. Froyseth.

But let us examine some of the numerous cases, to which no reference is made in the opinion in Sjoli v. Dreschel, which announce and apply principles directly contrary to or inconsistent with the broad language of that opinion as interpreted by the Court of Appeals in the Hoyt case. There is no lack of authorities directly in point. The great cases of Campbell v. Doe, 13 How. 244, Shepley v. Cowan, 91 U. S. 330, and McCreery v. Haskell, 119 U. S. 327, are referred to in Mr. Bunn's brief, and we shall not dwell upon them here at any great length. But there are certain features of those cases which we shall touch upon in passing. Each of those cases declares and applies the familiar doctrine, thus stated by Mr. Justice Field in Shepley v. Cowan:

> "The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. * * * In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

This principle was applied in McCreery v. Haskell to a selection which, in its essential qualities, was precisely like the selection in the case at bar. This was a state selection under a grant to the State of California by an act which provided (10 Stats. 247, Sec. 7):

> "That where any settlement * * * shall be made upon the 16th and 36th sections

> before the same shall be surveyed, or where such sections may be reserved for public uses, or taken by private claims, other lands shall be selected by the proper authorities of the state in lieu thereof, agreeably to the provisions of the act of Congress approved on the 20th of May, 1826, entitled 'An Act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for,' *and which shall be subject to approval by the Secretary of the Interior* * * *."

In that case Mr. Justice Field, delivering the unanimous opinion of the court, said:

> "The land * * * was open to settlement with other public lands, and consequent preemption by settlers, and to selection by the State in lieu of the school sections within the confirmed Mexican grant. * * * As between the settler and the State, the party which first commenced the proceedings required to obtain the title, if followed up to the final act of the government for its transfer, is considered as being entitled to the property. *In such cases the rule prevails that the first in time is the first in right.* * * * Where, by reason of the loss of the school sections, a selection is made of other lands, the list certified *operates upon the selection as of the day when made and reported to the local land office, and cuts off, as would a patent in such cases, all subsequent claimants.* In the present case, the selection by the authorities of the State of the land in controversy, was made on the 22nd of April, 1868, nearly one year and eight months before the alleged settlement of the plaintiff. *The subsequent approval of the selection by the Secretary of the Interior* and the listing of the land to the State by the Commissioner of the General Land Office, completed the proceedings which *vested the title in the State as of the date of the selection.*"

The cases of Shepley v. Cowan and McCreery v. Haskell have been cited, and the principle that in proceedings for the acquisition of public lands the first in time is the first in right and that the patent when issued relates back to the initiatory step and cuts off all intervening claimants has been applied, in a vast number of decisions by state and Federal courts and by the Land Department. A few of these cases are cited below.

Sturr v. Beck, 133 U. S. 541, 550.

Hy-Yu-Tse Mil-Kin v. Smith, 194 U. S. 401, 414.

United States v. Anderson, 194 U. S. 394, 399.

United States v. Detroit Lumber Co., 200 U. S. 321.

Wirth v. Branson, 98 U. S. 118.

Last Chance Mining Co. v. Tyler Mining Co., (C. C. A. 9th Cir.) 61 Fed. 557.

Peyton v. Desmond, (C. C. A. 8th Cir.) 129 Fed. 1.

Waldron v. United States, 143 Fed. 413.

Ison v. Nelson Mining Co., 47 Fed. 199.

Lilienthal v. Southern California R'y. Co., 56 Fed. 701.

Howell v. Slauson, 83 Cal. 539, 23 Pac. 692.

Brigham City v. Rich, 34 Utah 130, 97 Pac. 220.

Talbot v. King, 6 Mont. 76, 9 Pac. 434.

Silver Bow Mining & Milling Co. v. Clarke, 5 Mont. 378, 5 Pac. 570.

Benton v. Johncox, 17 Wash. 277, 49 Pac. 495.

Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 522, 91 N. W. 352.

Danforth v. Morrical, 84 Ill. 456.

It seems to us that the case of United States v. Anderson, 194 U. S. 394, is absolutely conclusive of the question now under discussion. That was a case involving a grant to the State of Alabama in aid of railroads, which provided for indemnity selections to be made by the agents of the State, subject to the approval of the Secretary of the Interior. Selections were duly made in 1887, but were rejected by the local officers under an erroneous view of the law. On appeal this action of the local officers was set aside, and in 1896 the selections were approved by the Secretary and the lands certified to the State. During the period which elapsed between the date of selection and the date of the approval by the Secretary, certain persons went upon the land and removed valuable iron ore and lime rock therefrom. The United States brought suit to recover for this trespass, and a compromise was made with the trespassers under which they paid $15,000 to the United States in settlement of the claim for the material removed from the land. Afterwards the persons succeeding to the rights of the State under the selection sued the United States in the Court of Claims and recovered judgment for $15,000. This judgment was affirmed by this court in an opinion by Mr. Justice White, who said:

> "Under these circumstances, the case is one for the application of the fiction of relation, by which, in the interest of justice, *a legal title is held to relate back to the initiatory step for the acquisition of the land.* Many cases illustrating the doctrine in various aspects have been determined in this court. (Citing au-

thorities in foot-note.) Indeed, this case is one coming peculiarly within the principle of relation, as the approval of the selections manifestly imported that at the time of the application for selections the land in quesiion was rightfully claimed by the applicant. * * * Here, as we have seen, the grantee had exercised his right to apply for selections within the indemnity limits and had in legal form requested the approval of the same by the Government. Everything, therefore, which the grantee was required by law to do to obtain the legal title had been performed. These facts bring the case within the principle decided in Heath v. Ross, 12 Johns. 140, and Musser v. McRae, 44 Minn. 343."

Musser v. McRae, 44 Minn. 343, was a case where timber was cut from the selected land by trespassers between the date of a railroad indemnity selection and the date of approval thereof; and it was held that the patent title related back to the date of selection so as to carry the right to recover for the trespass. The court says:

"Upon the state of facts presented by the record the title acquired by the company under the patent unquestionably inured to the plaintiffs, its grantees, and their further contention is that the title derived from the government under the patent took effect by relation as of the date of the selection of the lands by the company. * * * The deficiency lands selected by the company were such as they were entitled to, and the patent is evidence of the ratification of the selection, and this selection duly certified to the department, may be treated as a lawful application for the confirmation or approval thereof. It was an assertion of their claim to the particular lands, *and, if approved, the title may properly be held to relate back at least to the date of such selec-*

tion in order to protect them against trespassers upon the lands."

Musser v. McRae was expressly approved in United States v. Anderson, supra, and was recognized as authority, although distinguished upon the particular facts of that case, in United States v. Loughrey, 172 U. S. 206; where this court said of the decision in Musser v. McRae:

> "It was held that the issuance of a patent to the Railway Company for the lands so selected was evidence that the company had complied with all the conditions of the grant, and was entitled to the lands described therein, and that the title passed from the United States *at the date of the selection.* And it was further held that * * * the patents must be held to relate back to the selection of the lands, so as to save the purchasers to whom the lands had been granted, a right of action for the timber wrongfully removed from the land."

Now it seems to us that the decisions in United States v. Anderson and Musser v. McRae are wholly inconsistent with the idea that no rights attach by virtue of a selection allowed by the local officers, as against a claim initiated after such selection, but before approval thereof by the Secretary of the Interior. If such approval, and the patent issued in consequence thereof, relate back to the date of selection so as to enable the selector to recover the value of timber taken from the land before such approval, and to recover from the Government itself money collected by it in settlement of a claim for similar trespasses, how can it be held that the approval and patent do not relate back to

the date of selection and cut off claims subsequently initiated? Surely there is the stronger reason for the application of the doctrine of relation in the latter case. Indeed, it is for the purpose of cutting off intervening claims that the doctrine is most commonly invoked.

In the leading case of Stark v. Starrs, 6 Wall. 402, Mr. Justice Field said:

> "When in fact the patent does issue, it relates back to the inception of the right of the patentee, *so far as it may be necessary to cut off intervening claimants.*"

In Smelting Co. v. Kemp, 104 U. S. 647, the same great judge said:

> "This doctrine as to the conclusiveness of a patent is not inconsistent with the right of the patentee, often recognized by this court, to show the date of the original proceeding for the acquisition of the title, where it is not stated in the instrument, as the patent is deemed to take effect by relation as of that date, *so far as it is necessary to cut off intervening adverse claims.*"

In Heydenfeldt v. Daney Gold Min. Co., 93 U. S. 634, it was said:

> "The patent subsequently obtained from the United States relates back to the time of the original location and entry, and perfects their right *to the exclusion of all adverse intervening claims.*"

Peyton v. Desmond (C. C. A. 8th Cir.) 129 Fed. 1, was a case similar to United States v. Anderson and Musser v. McRae, except that it was a homestead settler who was there permitted to re-

cover for timber cut from the land before his settlement claim had ripened into an equitable title; and in support of the decision of the court, Judge Van Devanter cites the following language from Shepley v. Cowan, supra:

> "The party who takes the initiatory step in such cases if followed up to patent is deemed to have acquired the better right, as against others, to the premises. The patent which is afterwards issued relates back to the date of the initiatory act *and cuts off all intervening claimants.*"

The following language from the Eureka Case, 4 Sawy. 317, is quoted with approval in Silver Bow Mining & Milling Co. v. Clark, 5 Mont. 378, 5 Pac. 570:

> "Each patent is evidence of a perfected right in the patentee to the claim conveyed, the initiatory step for the acquisition of which was the original location. * * * The patent will take effect by relation as of that date, *so far as may be necessary to cut off all intervening claimants.* * * * As, in the system established for the alienation of the public lands, the patent is the consummation of a series of acts having for their object the acquisition of the title, the general rule is to give to it an operation by relation at the date of the initiatory step, so far as may be necessary to protect the patentee against subsequent claimants to the same property."

And in this connection the language already quoted above from McCreery v. Haskell is especially pertinent.

In addition to the authorities already cited, the following cases further support the principle that the doctrine of relation will be applied for the purpose of cutting off claims attaching after the initial step in the proceedings which culminate in patent:

Irvine v. Sims, 3 Dall. 425.

Ross v. Barland, 1 Pet. 655.

Beard v. Federy, 3 Wall. 478.

Weeks v. Bridgeman, 159 U. S. 541.

Patterson v. Tatum, 3 Sawy. 164.

Pacific Coast Mining & Milling Co. v. Spargo, 16 Fed. 348.

Klein v. Argenbright, 26 Iowa, 493.

Cothrin v. Faber, 68 Cal. 39, 4 Pac. 940.

St. Onge v. Day, 11 Colo. 368, 18 Pac. 278.

Faull v. Cooke, 19 Ore. 455, 26 Pac. 662.

Lockwitz v. Larson, 16 Utah, 275, 52 Pac. 279.

Washington Rock Co. v. Young, 29 Utah, 108, 80 Pac. 382.

Sage v. Crowley, 83 Minn. 314.

The basic principle which from the beginning has controlled the disposition of the public lands is that, as between conflicting claimants, the first in time is first in right, and that the patent relates back to the date of the initial step lawfully taken by the patentee, or his predecessors in interest, looking towards the acquisition of the land under the law providing for disposal of the same. This principle has been expressly declared in hundreds of cases, but few of which are cited in this brief, and in a still greater number of decisions it has been tacitly recognized and has controlled the determination of the court, although not referred to in terms. And all those cases are but applications of a fundamental rule which runs through the whole fabric of the public land law, and which controls, in some degree, the determination of practically every case where two or more parties claim the same tract of land. There is no principle of law having relation to the disposal of the public lands and to land titles in general which is so well settled or which has had such widespread and long-continued application. And there is surely none whose reversal or modification would so complicate and disturb the administration of the public lands and the security of titles.

In the course of a somewhat extensive experience in public land questions, and after a most exhaustive search among the authorities bearing upon this particular question, we have not learned of a single case in which this principle has been denied, or which gives authority for the conclusion adopted

by the Court of Appeals in the Hoyt case—except as such intent may be imputed to the language of Sjoli v. Dreschel, and except for the recent decisions based upon the wording of that opinion.

That principle has been applied to entries and claims of every character, and as to no class of claims has it been denied or disregarded. And always the date that fixes priority is held to be the date of the initial step taken under the law, whether that first step be settlement on the land, the filing of a declaratory statement or application to enter or purchase, the deposit of a land warrant or other certificate, or the filing of a selection list or application to select. And it is always the act of settlement or the filing of the application or other paper in the local land office that fixes the right, regardless of the date when action is taken thereon by the local land officers, the Commissioner of the General Land Office, or the Secretary of the Interior. In no case that we have found has the attaching of the claimants rights, as a matter of priority over other claims, been postponed to the date when action was taken on his claim or selection by the officers of the Land Department, if the initial step was lawfully taken and the land was then subject to such appropriation.

We have selected for the information of the court a few of the numerous cases illustrating the application of this principle to different classes of claims; indicating, in each case, the character of the

entry and the date from which the claim was held to have priority.

Preemption entry: from date of settlement on land, where that act preceded the filing of the declaratory statement:

Johnson v. Towsley, 13 Wall. 72.

Shepley v. Cowan, 91 U. S. 330.

Lilienthal v. Southern California Ry. Co., 56 Fed. 701.

Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 522, 91 N. W. 352.

Preemption entry: from date of filing the declaratory statement, where that act preceded settlement:

St. Onge v. Day, 11 Colo. 368, 18 Pac. 278.

Homestead entry: from date of settlement, where that act preceded the filing of application to enter.

Ard v. Brandon, 156 U. S. 537.

Osborn v. Froyseth (decided by this court March 14, 1910).

Faull v. Cooke, 19 Ore. 455, 26 Pac. 662.

Homestead entry: from date of filing application to enter, where the act preceded settlement.

Sturr v. Beck, 133 U. S. 541.

Peyton v. Desmond, (C. C. A. 8th Cir.) 129 Fed. 1.

Timber and stone entry: from date of filing application.

St. Paul, M. & M. Ry. Co. v. Donohue, 210 U. S. 21.

State selection under quantity grant: from date of filing application to select in local land office.

Ison v. Nelson Mining Co., 47 Fed. 199.

Patterson v. Tatum, 3 Sawy. 164.

Brigham City v. Rich, 34 Utah 130, 97 Pac. 220.

State selection of indemnity lands: from date of filing application to select in local land office.

McCreery v. Haskell, 119 U. S. 327.

Howell v. Slauson, 83 Cal. 539, 23 Pac. 692.

Mining claim: from the date of location.

Heydenfeldt v. Daney Gold Min. Co., 93 U. S. 634.

Last Chance Min. Co. v. Tyler Min. Co. (C. C. A. 9th Cir.) 61 Fed. 557.

Talbot v. King, 6 Mont. 76, 9 Pac. 434.

Silver Bow Mining & Milling Co. v. Clarke, 5 Mont. 378, 5 Pac. 570.

Indian allotment: from date of application for allotment or date of settlement.

Waldron v. United States, 143 Fed. 413.

Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401.

Spanish or Mexican grant: from date of filing application for confirmation.

Ross v. Barland, 1 Pet. 655.

Landes v. Brand, 10 How. 348.

Beard v. Federy, 3 Wall. 478.

Lynch v. Bernal, 9 Wall. 315.

Military bounty land warrants: from date of location by filing in local land office.

Wirth v. Branson, 98 U. S. 118.

Klein v. Argenbright, 26 Iowa 493.

Lieu selection under the exchange provisions of the so-called "Forest Reserve Lien Selection Act" of June 4, 1897: from date of filing application to select in local land office.

Clarke v. Northern Pacific, 30 L. D. 145.
Gideon F. McDonald, 30 L. D. 124.
Kern Oil Co. v. Clarke, 30 L. D. 550.

Lieu selection under the exchange provisions of the act of March 2, 1899, establishing the Mt. Rainier National Park: from date of filing application to select in local land office.

Ferguson v. Northern Pacific, 33 L. D. 634.
Swanson v. Northern Pacific, 37 L. D. 74.
State of Idaho v. Northern Pacific, 37 L. D. 70.

Lieu selection under act of July 1, 1898, for the adjustment of conflicting claims under the Northern Pacific grant: from date of filing application to select in local land office.

Northern Pacific v. Mann, 33 L. D. 621.

Soldier's additional homestead: from date of filing application to enter in local land office.

Oliver v. Thomas, 5 L. D. 289.

As between two railroad companies whose indemnity limits overlap "priority of selection secures priority of right," and the priority depends on the date of filing the selection list.

St. Paul & Sioux City Railroad v. Winona & St. Peter Railroad, 112 U. S. 720.

There is nothing whatever in such decisions as Wisconsin Central v. Price County, 133 U. S. 496, Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, Humbird v. Avery, 195 U. S. 480, and Oregon & Californina Railroad Co. v. United States, 189 U. S. 103 and 116, (and there are many cases of the same general character) which is in any respect inconsistent with the doctrine we invoke. In each of those cases it is held that approval by the Secretary of the Interior is necessary to convert a railroad indemnity selection into an estate or interest entitled to recognition *as against the United States*, or into an equitable title which can be used as a basis for proceedings in which *ownership* of the land is an essential prerequisite.

There is a clear distinction between acts necessary to establish an equitable title or vested interest in the land as against the Government, and acts necessary to secure priority over an adverse claimant under the public land laws. It is freely admitted that until approval of an indemnity selection the selector has no rights as against the United States; and that until such approval it is competent for the Government to deal with or dispose of the land as it sees fit. But this is a very different thing from saying that the act of selection, when followed up by approval, gives no rights or priority over an individual who attempts to initiate a claim to the land subsequent to such selection, but prior to the approval thereof.

Under practically every method by which public lands are acquired, and especially in the case of

entries under the preemption law, the homestead law, and the timber and stone act, there is an initial step—settlement on the land, or the filing in the local land office of a declaratory statement or application to enter—which fixes priorities as between the applicant and a possible adverse claimant, but which confers no vested right as against the Government. It is settled by numerous decisions that until the preemptioner or timber and stone applicant has completed his entry by final proof and payment, and until the homesteader has earned the land by full compliance with the requirements of the homestead law, the Government may dispose of the land as it sees fit, and the claimant has no standing to complain of any such disposition.

Frisbie v. Whitney, 9 Wall. 187.

The Yosemite Valley Case, 15 Wall. 77.

Consequently the fact that an indemnity selection does not, prior to approval, create a right or interest effective against the Government or vest in the company an estate which is subject to taxation or an equitable title which will support an action dependent upon ownership, has no bearing on the question whether such selection, if otherwise valid, has priority over a claim subsequently initiated under the homestead law or the timber and stone act. This distinction was recognized in Cosmos Exploration Co. v. Gray Eagle Oil Co., supra, where it was held that a lieu selection under the act of June 4, 1897, did not vest an equitable title

in the selector until approval of such selection by the Secretary. After so declaring, Justice Peckham said:

> "It may be that when the decision of the Land Department is made, if it be favorable to the applicant, the complete equitable title claimed will accrue *from the time the selection of the lands was made in the local land office*, and when the patent subsequently issues the legal title *will vest from the time of selection*."

And in the course of the opinion in Oregon & California Railroad Co. v. United States, supra, Mr. Justice Harlan said:

> "The rule is otherwise as to lands within indemnity limits. As to lands of the latter class the Company *acquires no interest* in any specific sections until a selection is made with the approval of the Land Department; *and then its right relates to the date of the selection*."

The Supreme Court of Missouri in Hammond v. Johnston, 93 Mo. 198, 6 S. W. 83, recognized this distinction as applied to selections under the New Madrid Act, saying:

> "It is true, beyond all doubt, that as between Easton and those claiming under him on the one hand, and the United States on the other, there was no vested right in Easton and those claiming under him, as against the United States, until the surveyor returned the plat to the recorder of land titles, which was not done until 1833. *But as between Easton and third persons, he did acquire a priority* and a right which the courts respect and uphold and enforce."

In some of the arguments in this case much emphasis has been laid upon the provision in the granting act to the effect that indemnity selections shall be made "subject to the approval of the Secretary of the Interior," or "under the direction of the Secretary of the Interior"; but these provisions do not affect the question of priority. They are very material in determining whether any right is secured by the Railway Company, *as against the United States*, by the mere filing of its list of selections. But as explained above, this is something entirely distinct and different from the question of priorities as between individual claimants. Until the selection has been passed upon and approved by the Secretary, it has no standing as against the Government; but when the selection has been examined and found to be legal and valid, and the required approval has been given, that approval relates back to and takes effect from the date of the filing of the selection list in the local office, as against claims asserted by an individual whose alleged rights have had their inception in the interim.

In passing upon such selections the Secretary acts in a judicial or quasi-judicial capacity. His discretion to approve or disapprove the selections is not arbitrary and unrestrained, but must be exercised in a reasonable and judicial manner. If the land is free from adverse claims and is such as the Company is entitled to select, if a deficiency exists for which the Company is entitled to indemnity, and if the selection and the proceedings connected therewith are in all respects regular and in accordance with the law and departmental regulations, then it is the duty of the Secretary to approve such selection.

In McHenry v. Nygard, 72 Minn. 2, Judge Mitchell said:

> "Although the selection of the lieu lands was to be made under the direction of the Secretary of the Interior, they were to be selected by the railroad company, and not by the Secretary. If the company was entitled to select the land, and did so in conformity with all the requirements of law, the officers of the Land Department had no authority arbitrarily to refuse to recognize and approve the selection. The rights of the Company under its selection became fixed and vested notwithstanding such rejection and refusal."

In Jones v. Northern Pacific, 34 L. D. 105, 110, the Secretary said:

> "That the right of selection conferred by these acts cannot be restricted by the Secretary of the Interior seems clear. His duty in the premises is to supervise the administration of the grant, but this authority does not permit him to abridge or enlarge the laws of Congress. He should see that the selections made in sat-

> isfaction of the grant are confined to the lands described in the granting act, but as between different sections equally within the description contained therein, he cannot say which may or which may not be selected, for in so doing he would be denying the railroad company the right to make the selection."

In Willamette Valley and Cascade Wagon Road Co. v. Bruner, 26 L. D. 356, it was said:

> "The right of selection conferred by the granting act cannot be restricted or limited by the Secretary of the Interior. It is his duty to supervise the administration of this grant but his authority does not permit him to revise or limit the laws of Congress. He is as much bound by the provisions of the granting act as is either of the claimants in this case. It is the duty of the Secretary to see that the selections made in satisfaction of the grant are confined to lands described in the granting act. * * * The supervisory authority of the Secretary is not unlimited and cannot be exercised arbitrarily for the purpose of conferring rights upon one person to the detriment of the acknowledged rights of others; Cornelius v. Kessel, 128 U. S. 456."

See also:

Sage v. Swenson, 65 Minn. 517.

Southern Pacific v. Wiggs, 43 Fed. 333.

St. Paul & Sioux City v. Winona & St. Peter, 112 U. S. 720.

Insofar as a distinction may be drawn between an act which provides that selections thereunder shall be "subject to the approval" of the Secretary, and one which provides that selections shall be made "under the direction" of the Secretary, the distinction is favorable to selections under a provi-

sion of the latter sort. It has been well said that a selection is made "under the direction" of the Secretary, when it is made pursuant to general regulations or instructions promulgated by him; whereas, where the statute expressly requires his "approval," an affirmative approval of the specific selections is necessary to vest title thereunder.

In Southern Pac. R. Co. v. Wiggs, 43 Fed. 333, Judge Sawyer said:

> "Although the selection of the lieu lands were to be 'made under the direction of the Secretary of the Interior,' they were to be 'selected by said company,' not by him; nor was the selection required to be approved by him as is required by some other acts. And when there was a deficiency, and the company selected lands open to selection, there was no authority vested in the Secretary to arbitrarily refuse to recognize and allow such selection. This would deprive the company of the right of selection expressly given by the statute, and vest it in the Secretary."

But the case at bar has been argued and is submitted on the theory that the same rules apply against the selection under which defendants derive title, that would apply if the act provided that selections thereunder should be made "subject to the approval" of the Secretary.

There is another point which is entitled to great weight in the consideration of this question. The Land Department has always held that no rights can be acquired by an entry made subsequent to a valid railroad indemnity selection, although prior to the approval of such selection. In the beginning it was supposed that a withdrawal of lands within the indemnity limits, in aid of the company's right of selection, prevented the attaching of adverse claims, even where settlement was made or application filed before actual selection of the lands by the company. Consequently in those days the question seldom arose where priority depended upon the date of selection rather than upon the date of withdrawal; since in most cases withdrawal preceded selection. But even then there was sometimes a case where there had been no effective withdrawal, but where the company had filed its selection list before the inception of the adverse claim; and in every such instance the selection was held to give priority. Since the rule was established that the withdrawal of indemnity lands prior to selection is unauthorized and ineffectual, the Department has consistently held, in numerous cases, that the date of actual selection (which is interpreted to mean the date the selection list is filed in the local office), regardless of the date of approval, determines the rights of the company as against adverse claimants; and has steadfastly refused to recognize claims initiated after that date, where the original selection is found to be regular and valid. We cite below a few of the many cases

illustrating the various phases of this rule:

Bright v. Northern Pacific, 6 L. D. 613.

Simser v. Southern Minnesota Ry. Co., 12 L. D. 386.

Florida Central v. Peninsular Railroad Co., 18 L. D. 333.

Gamble v. Northern Pacific, 2 L. D. 351.

Page v. Northern Pacific, 24 L. D. 444.

Northern Pacific v. Templeton, 27 L. D. 543.

Northern Pacific v. Wolfe, 28 L. D. 298.

Falje v. Moe, 28 L. D. 371.

Southern Pacific Railroad Co., 28 L. D. 281.

Oregon & California Railroad v. Johnston, 29 L. D. 442.

Northern Pacific v. Smith, 31 L. D. 151.

Southern Pacific Railroad Co., 32 L. D. 51.

Eaton v. Northern Pacific, 33 L. D. 426.

Santa Fe Pacific Railroad Co., 33 L. D. 161.

Jones v. Northern Pacific, 34 L. D. 105.

Ferguson v. Northern Pacific, 37 L. D. 260.

Norris v. Northern Pacific, 37 L. D. 426.

Under the familiar rule already referred to in this brief in another connection, where the authorities are cited, these decisions of the Land Department should be given great weight by the court and should not be overruled except for the most cogent reasons nor unless it is plain beyond doubt that they declare an erroneous rule of law.

Now we respectfully submit that the rule which forms the basis of the departmental decisions cited above is right, in principle and upon authority, and ought to be sustained independent of the weight to which those cases are entitled as decisions of the

department charged with the duty of executing the statutes thus construed. We submit that the rule is a rule of practical justice and is conducive to orderly administration; and that a contrary rule would create disturbance and disorder and would serve no good or useful purpose.

Such a rule is consistent with the principles which control the practice of the Department under all the various laws for the disposition of the public domain—it is a rule of necessity, without which an orderly administration would be impossible—and there is no fair reason for distinguishing a railroad indemnity selection from any form of acquisition of public land. Every method by which public land may be acquired under the law necessarily involves, first, the act by which the claimant indicates his desire to appropriate specific land, and next, a determination by the Department that he is entitled to take that particular land. Obviously the assertion of the claim must precede the determination by the Department, and in the ordinary course of administration considerable time must often elapse before the determination can be made. In no class of cases is delay so likely to occur as in the consideration of railroad indemnity selections, where the Department must determine not only whether the land selected is such as the company is entitled to receive, but also whether the loss for which indemnity is claimed furnishes proper ground for such selection; and rarely, if ever, is the delay chargeable to neglect or omission of the company.

It has uniformly been held, from the beginning, that a claimant who has fully complied with the law on his part cannot be prejudiced by delay in passing upon his claim, and that no claim subsequently initiated will be permitted to defeat his rights; but when his entry has been passed upon by the Department the patent issued to him relates back to the date of the first lawful assertion of his right and cuts off all intervening claims. Now what just reason can there be for applying a different rule in the case of railroad indemnity selections? If the company is entitled to the land under its granting act, if the land is free from other claims at the time of selection, and if the selection is properly made in accordance with the regulations and practice of the Department, why should the company suffer from delay of the Department in passing upon the selection, and why should the company be deprived of its rights in favor of a speculator who seeks to enter the land with full knowledge of the company's prior selection? We repeat that such a rule, in practical operation, will be subversive of good administration and will work injustice and disorder and create uncertainty, and that it will serve no good or useful purpose.

IV.

THE PATENT MUST BE TREATED AS A CONCLUSIVE ADJUDICATION OF ALL QUESTIONS OF FACT OR OF MIXED LAW AND FACT AS TO THE RIGHT OF THE RAILWAY COMPANY TO THE LAND, AND THIS FORECLOSES MOST OF THE OBJECTIONS URGED BY COMPLAINANT AGAINST THE VALIDITY OF THE SELECTION.

The issuance of patent implies and includes an adjudication by a quasi-judicial tribunal, conclusive as to all questions of fact necessarily involved in the determination that the patentee is entitled to the land. Where, as in this case, the land conveyed by the patent is land within the jurisdiction of the Department, the patent is impervious to collateral attack, or to attack in an action at law, upon any ground; and it can only be attacked in equity upon the ground of fraud, plain mistake or palpable error of law. The courts will not, in any form of action, undertake to review any question of fact involved in the determination which the issuance of patent implies. All this is familiar doctrine, and it is unnecessary to cite authorities in its support. But the rule is the same where the adjudication which the patent implies involves questions of *mixed law and fact.*

In Marquez v. Frisbie, 101 U. S. 473, 476, Mr. Justice Miller said:

> "The language of this court in Moore v. Robbins, 96 U. S. 530, 535, cited above, is that equity will interfere 'when it is *clear* (italics

by the court) that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another.' This means, and it is a sound principle, that where there is a *mixed question of law and of fact*, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."

To the same effect are:

Green v. Hayes, 70 Cal. 276, 11 Pac. 716.

Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398, 401.

Cook v. McCord, 9 Okla. 200, 60 Pac. 497, 500.

Estes v. Timmons, 12 Okla. 537, 73 Pac. 303, 305.

Bates & Guild Co. v. Payne, 194 U. S. 106, 109.

Now it seems to us that many of the objections which complainant urges against the validity of the original selection by the Railway Company involve questions of mixed law and fact, as to which the judgment of the Department is conclusive under the rule referred to. This is obviously true of the proposition that the selection was invalid because there were other lands open to selection, as to which the Railway Company was required to exhaust its right before resorting to the land in controversy; such as land within the first indemnity limits and land nearer to the tract which was the basis for the particular selection. It is also true of certain of the objections based upon supposed irregularities in the selection lists and the proceedings thereon, and upon an alleged want of authority on the part of the representatives of the Railway Company

making the selection. And we think it is likewise true of the objection that the Northern Pacific Rail*way* Company did not lawfully succeed to the land and land grant rights of the Northern Pacific Rail*road* Company. It seems very plain to us that this question involves an issue of fact as well as an issue of law, and that upon the record in this case those issues cannot be separated so as to resolve the question into one of pure law, within the rule of Marquez v. Frisbie, supra.

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SUPREME COURT OF THE UNITED STATES.

No. 12. October Term, 1910.

CHARLES D. CAMPBELL,

Appellant,

vs.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD,

Appellees.

BRIEF FOR APPELLEES ON REARGUMENT.

FRANK B. KELLOGG,
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PRELIMINARY STATEMENT.

The appellant here, who was appellant in the Court of Appeals also, was complainant in the Circuit Court. The appellees here were defendants in the Circuit Court and appellees in the Court of Appeals. As it will be necessary for us to refer frequently to another case in which the position of the parties is reversed in this court, we think it may prevent confusion if throughout this brief we refer to the appellant as complainant and to the appellees as defendants.

The case is a suit in equity to subject the patent title to the land in controversy to the alleged superior equitable claim of the complainant. The Circuit Court entered a decree dismissing the bill, which was affirmed by the Court of Appeals; and complainant has appealed to this court.

The defendants hold under patent of the United States, issued to the Northern Pacific Railway Company upon a selection of the land in controversy under the indemnity provisions of the Northern Pacific grants; the land having been conveyed by the Railway Company to defendants by warranty deed, prior to the commencement of this suit. The sole basis of complainant's claim is that on October 26, 1895, long subsequent to the selection of the land by the Railway Company, although prior to the approval of such selection by the Secretary of the Interior, complainant proffered to the Register and Receiver of the local land office of the district in which the land is situated, an application to purchase the same under the provisions of the act of June 3, 1878, familiarly known as the "Timber and Stone Act." The Register and Receiver rejected complainant's application on the ground that the land was subject to the prior selection thereof by the Railway Company; and this action of the Register and Receiver was affirmed on appeal. The Railway Company's selection was ultimately approved by the Secretary, and a patent for the land was duly issued to it.

After the issuance of patent to the Railway Company and the conveyance of the land to the defend-

ants, complainant brought this suit. The Court of Appeals held, independently of other questions in the case, that complainant did not occupy a status which enabled him to question the patent title in the courts; and affirmed the decree dismissing the bill without determining whether the officers of the Land Department ought to have accepted complainant's application and permitted him to purchase the land.

This case was submitted to and decided by the Circuit Court and the Court of Appeals at the same time with another case in which Herbert H. Hoyt was complainant and the defendants in this case were defendants; and that case is now before this court on appeal by the defendants under the title of Frederick Weyerhaeuser and John A. Humbird, appellants, v. Herbert H. Hoyt, appellee (No. 24 on the present calendar.) This court has before it, also, the case of Northern Pacific Railway Company v. Fred Wass and Pauline Wass (No. 181 on the present calendar), which comes here on writ of error from the Supreme Court of Minnesota. We shall have occasion to refer frequently in this brief to those cases, and for brevity we shall refer to No. 24 as "the Hoyt case," to No. 181 as "the Wass case" and to this as "the Campbell case."

These three cases were argued together at the last term (in the latter part of April, 1910); and on December 19, 1910, the three cases were restored to the docket for reargument, and were again set down to be argued together.

The Hoyt case is in many respects similar to the

Campbell case, and while there is less similarity in the Wass case, there are some questions—one of which is of the most vital character—common to all three cases. But there are also important elements of difference between them—the Hoyt case involves questions which are not present in the Campbell case; the Campbell case involves the question which the Court of Appeals made the sole ground for its decision in that case, but which does not appear in the Hoyt case or in the Wass case at all; and there is one point common to the Campbell and Wass cases which is not involved in the Hoyt case.

Most of the questions common to the three cases are discussed in the brief which will be filed herein by Mr. Charles W. Bunn, with whom we are associated as counsel for defendants in this case; and we do not intend to retraverse the ground covered by Mr. Bunn's brief. Our purpose is to confine this brief to the question peculiar to the Campbell case (which is the question that the Court of Appeals deemed decisive of the case); and to a discussion of some of the points common to this case and one or both of the other cases, supplementing, but not reiterating, the arguments in Mr. Bunn's brief.

We think it essential to a proper appreciation of the issues in this case that the court should consider the issues in the Hoyt and Wass cases in their relation to those of the Campbell case. And we believe that a clearer understanding of the situation will be given by a statement of the facts of the Campbell case, followed by a statement of the

points wherein the Hoyt case and the Wass case differ from this. But as we do not intend to argue all the questions which this case may possibly be held to involve, and as the other briefs to be filed will doubtless contain full statements of the facts, we think we may properly omit reference to matters which have no possible bearing upon the questions here to be argued.

(Note: The italics in quotations appearing in this brief are ours, unless the contrary is expressly indicated.)

STATEMENT OF FACTS.

On October 17, 1883, the Northern Pacific Railroad Company duly filed in the United States Land Office at Duluth, Minnesota, its selection list No. 15, whereby it applied to select the lands in controversy in the Hoyt and Campbell cases, and a quantity of other lands, as indemnity for specified losses within the place limits of its grant. The list so filed specified the lands lost, by specific description; but did not assign each selection to a particular description of land lost. This was in accordance with the practice of the Department at that time. Subsequently the practice was changed so as to require a specific loss to be assigned for each tract selected. Thereafter, on April 11, 1893, pursuant to the direction and with the permission of the Secretary of the Interior, the Railroad Company filed a rearrangement of said list No. 15, in which the same bases of lands lost were assigned, but a particular tract lost was assigned as a base for each tract selected. At the time of filing the original list the company tendered and paid the fees required by law. The Register and Receiver accepted and allowed the selections, and attached to the list a certificate which acknowledged receipt of the fees and which contained the following:

> "We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Northern Pacific Railroad Company, under the grant to the said company by act of Congress approved July 2, 1864, and

joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad Company by Chas. B. Lamborn, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, *and that we find the same to be correct: and we further certify that the filing of said list is allowed and approved*, and that the whole of said lands are surveyed public lands of the United States, and within the limit of 40 miles on each side; and that the same are not, nor is any part thereof returned and denominated as mineral land or lands, nor claimed as swamp lands; nor is there any homestead, pre-emption, state or any other valid claim to any portion of said lands on file or record in this office." (Record, p. 2.)

The final approval of the selections by the Secretary of the Interior necessarily involved an affirmance of the findings of the Register and Receiver embodied in the foregoing certificate; indeed, the approval by the Secretary is based upon express findings to the same effect, made by the various examiners and chiefs of division and approved by the Commissioner (Record, pp. 93-96).

These selections were held up for many years, at first because of controversy as to whether Duluth or Ashland was the eastern terminus of the Northern Pacific grant, and later because of the contests waged in the Department by Campbell and other claimants. Meanwhile the Northern Pacific Railway Company succeeded to the rights of the Railroad Company under these selections, by foreclosure proceedings and judicial sale, and its successorship was in time duly recognized by the Interior Department, under advice of the Attorney General

of the United States. Finally on November 10, 1905, the selection of the land in controversy in the Campbell case was approved by the Secretary of the Interior (Record, pp. 93-96), and on November 13, 1905, a patent for the land was duly issued to the Railway Company (Record, p. 89); which had theretofore conveyed the land to the defendants by warranty deed. The selection of the tract involved in the Hoyt case was approved and patent issued some weeks earlier.

On October 26, 1895, the complainant Campbell presented to the Register and Receiver of the local land office an application to purchase the land in controversy under the act of June 3, 1878—the Timber and Stone Act. The Register and Receiver rejected the application on the ground that the land was already subject to the selection thereof previously made by the Railway Company. For the purpose of this argument, it may be conceded that Campbell possessed the necessary qualifications, that his application was in proper form, and that but for the prior selection of the land by the Railway Company it would have been open to purchase under that act and complainant's application should have been allowed. The bill also alleges that Campbell "renewed" his application on November 9, 1896, and again on December 28, 1897, but that on each occasion his application was rejected by the Register and Receiver on the same ground as before.

In order that the issue of law which we propose to discuss may be clearly defined, we state here

that the arguments in this brief will proceed upon the assumption that if the prior selection of this land by the Railway Company did not operate to withdraw or segregate it as against other claims subsequently initiated, and if, notwithstanding such selection, the land was still to be regarded as part of the unappropriated public domain, open to entry or settlement by any qualified person, then the action of the Register and Receiver was erroneous; otherwise complainant's application was rightly rejected.

Complainant appealed to the Commissioner of the General Land Office from the decision of the Register and Receiver rejecting his original application, but he took no appeal from the action of those officers on the successive "renewals" of that application. On August 31, 1900, the Commissioner filed a decision affirming the rejection of complainant's application. Action on that decision was suspended for a time; but on October 3, 1901, the Commissioner filed another decision finally rejecting the application (Record, pp. 4-8, 27-30).

Complainant appealed to the Secretary of the Interior, who, on September 6, 1905, rendered a decision affirming the action of the Commissioner and of the Register and Receiver. That decision was made upon the authority of the previous decisions of the Secretary in the cases of Eaton v. Northern Pacific Railway Company, 33 L. D. 426, and Jones v. Northern Pacific Railway Company, 34 L. D. 105 (Record, pp. 8-9). The opinion of the Secretary in the case of Jones v. Northern Pacific is

printed in the record in this case (Record, pp. 30-38).

This suit was commenced November 16, 1905, in the District Court of St. Louis county, Minnesota, whence it was removed by defendants to the United States Circuit Court. Complainant concludes his bill of complaint with the following prayer for relief:

> "Wherefore, this plaintiff prays that this Honorable Court by its decree will adjudge and decree that the patent issued by the United States to the Northern Pacific Railway Company was so issued under a mistake of law, *and that said patent be delivered up and cancelled; and that the plaintiff may proceed to final proof for the land* here in controversy; and that all persons claiming or to claim by or under the defendants be forever barred and enjoined from claiming any title, right or interest in said land adverse to this plaintiff, and for such other and further relief as may be just." (Record, p. 26.)

Complainant further prayed an injunction *pendente lite* against the cutting of timber on the land.

It appears affirmatively upon the face of the bill of complaint, as well as from the evidence, that complainant never tendered payment for the land at the local land office or elsewhere, and that he never offered to make the proofs required by law. He rested solely upon his declaratory statement or application, rejected by the local land officers; and neither before nor after the adverse decisions by the Commissioner and Secretary did he make any effort to comply with the requirements as to proof

and payment which are necessary prerequisites to the acquisition of land under the Timber and Stone Act. Complainant alleged in his bill that he

> "has at all times been ready and willing to perfect his title to said land by doing all things that the law requires of him, including the payment for the land; and would long ago have completed his entry by payment had he not been prevented from so doing by reason of conflicting claims to the same, etc." (Record, p. 9.)

But this is a very different thing from performance of the conditions which are essential to the acquisition of land under the public land laws, and very different from an actual *tender* of proofs and payment. Indeed, there is neither allegation nor evidence that complainant was ever *able* to make proof or payment. The allegation quoted above is the only thing in the bill which bears upon that subject, and all the evidence on the point is comprehended in the following questions and answers in the course of the examination of complainant, by his own counsel, as a witness in his own behalf:

> "Q. Have you at all times since your application in 1895 for this land been ready and willing to complete your entry by paying the amount the Government required for acquiring that land? A. Yes, sir.
>
> Q. Why have you not completed your entry? A. Well, because I couldn't. I had contest on the land and before I got that off I couldn't do anything after that.
>
> Q. Couldn't do anything on account of an order from the Department that nothing further should be done in such cases? A. Yes, sir." (Record, p. 80.)

In short, it not only appears affirmatively that there was no offer or tender of proof or payment, but there is also neither allegation nor evidence that the complainant was ever in position to make such proof or payment.

So far as concerns the questions to be argued in this brief, the essential difference between the Hoyt case and the Campbell case is this: On December 17, 1897, Hoyt's grantor, Jones, made a similar application to purchase, under the Timber and Stone Act, the land involved in that case. But instead of rejecting his application, the Register and Receiver received and allowed it; and on March 22, 1898, Jones was permitted to make final proof in the usual manner. Subsequently, on December 10, 1898, Jones paid the full purchase price for the land required by the provisions of the Timber and Stone Act, and the usual final receipt was issued to him. It is true that across the face of the receipt was written a memorandum to the effect that the receipt was issued "subject to any claim the Northern Pacific Railroad Company may have to the lands herein described"; but in other respects the receipt was in usual form. (See opinion in Hoyt case; Hoyt v. Weyerhaeuser, 161 Fed. 324, 326.)

Campbell's application was rejected when proffered, and he never made any offer of the requisite proofs and never paid or tendered payment of the required purchase price; while Hoyt's grantor made

the necessary proofs and payment and obtained a final receipt, so that nothing remained to be done on his part to entitle him to patent in case the land was open to his entry at the time it was made.

The Circuit Court held in favor of the defendants in both cases. The Court of Appeals held in favor of the defendants in the Campbell case, but against them in the Hoyt case; in the latter case reversing the decree dismissing the bill, and directing the entry of a decree in favor of the complainant.

The distinction between the cases, and the ground upon which the Court of Appeals denied complainant relief, is thus stated by Judge Sanborn, in delivering the opinion of that court (Campbell v. Weyerhaeuser, 161 Fed. 332):

> "The facts of this case differ from the facts in that (the Hoyt) case in this: In Hoyt's case his remote grantor Jones entered, purchased and paid for his land * * * before its selection by the Railway Company had been approved by the Secretary of the Interior. In this case the complainant Campbell repeatedly filed with the Land Department his application to enter the land * * * before the Railway Company's selection of that land was approved by the Secretary of the Interior, but the officers of the Land Department rejected his application each time and refused to permit him to enter the land. In Hoyt's case Jones became the vendee of the United States, paid for and became the equitable owner of his land. In this case Campbell was refused permission to purchase the land he seeks, he never entered or paid for it, his right to buy it was never recognized by the United States, and he was never in privity with it. The difference is radical and fatal to this suit in equity. One who has never by acceptance of a grant, or by

> settlement and improvement, or by occupation, or by entry, or by payment, placed himself in privity with the United States in title before a patent issues to another, may not maintain a bill in equity to charge the title under the patent with a trust in his favor (Citing Smelting Co. v. Kemp, 104 U. S. 636, 647, and other authorities). The indispensable basis of a suit in equity to charge the legal title to land under a patent is an equitable interest in the land in the complainant which is superior to the legal title in the defendant."

And it was held accordingly that Campbell's bill was properly dismissed. But in the Hoyt case, on the contrary, Hoyt was held entitled to a decree.

Insofar as is material to the questions which will be discussed in this brief, the facts in the Wass case are as follows:

On December 31, 1877, the Western Railway Company of Minnesota filed in the proper Land office a list of selections under the indemnity provisions of its grant, which included the land involved in the Wass case. Afterwards, on December 4, 1889, the St. Paul & Northern Pacific Railway Company, as successor in interest of the Western Railway Company, filed an amended selection list, including the same lands, and on February 12, 1892, filed a rearranged list, in which for the first time it designated a particular loss as the basis for each of the tracts selected as indemnity. On February 16, 1905, the selections were approved by

the Secretary of the Interior, and on March 15, 1905, a patent for the land was issued to the Northern Pacific Railway Company, as successor in interest of the Western Pacific and St. Paul & Northern Pacific companies.

In the month of April, 1899, years after the Railway Company's selections were made, but prior to the approval thereof by the Secretary of the Interior, Wass (who was a qualified homesteader) settled upon the land, intending to acquire the same under the homestead law. On December 4, 1899, he made due application to the local land officers to enter the land as a homestead, and tendered the prescribed fees; but his application was rejected for conflict with the pending selection by the Railway Company. Wass appealed, but the Commissioner and the Secretary successively held that the Railway selection was valid on its face and segregated the land as against Wass's application and settlement rights; and affirmed the rejection of his application. Notwithstanding these adverse decisions by the officers of the Land Department, Wass continued in possession of the land, claiming it as his homestead, at all times from the date of his original settlement to the present day. He established his home thereon, improved and cultivated the land, and in all respects complied with the requirements of the homestead law. At the time patent was issued to the Railway Company, and (of course) at the time suit was commenced, he had resided on and cultivated the land for more than five years; so that, if the land was subject to

his homestead entry at the time he settled thereon or at the time he made application to enter the same, he had fully earned it under the homestead law and was entitled to patent therefor (Record, Wass case, pp. 6-8).

It seems unnecessary to point out the very plain distinction between the Campbell case and the Wass case with respect to the question upon which the Court of Appeals grounded its decision in the Campbell case, viz.: the question whether the claimant against the patent had done those things necessary to give him a status which entitled him to attack the patent title. In this respect the Wass case seems to come within the rule of such cases as Ard v. Brandon, 156 U. S. 537; Brandon v. Ard, 211 U. S. 11; and Osborn v. Froyseth, 216 U. S. 571; cited elsewhere in this brief.

But the Wass case is like the Campbell case (and unlike the Hoyt case) in this, that at the time Wass initiated his settlement and at the time he tendered his application to enter, and at the time Campbell tendered his application to purchase, the land in question was subject to an indemnity selection by the Railway Company, valid and regular upon its face, which had been accepted and allowed by the local land officers, and which then stood of record, uncancelled and in full force. Under a familiar rule such selection, while it remained uncancelled of record, *segregated* the land, and raised an efficient barrier against the initiation of any adverse claim thereto, by setlement or by application to enter or purchase.

ARGUMENT.

I.

THE COMPLAINANT CAMPBELL DOES NOT OCCUPY A POSITION WHICH ENABLES HIM TO ATTACK THE PATENT TITLE, EVEN IF IT SHOULD APPEAR THAT HIS APPLICATION TO ENTER THE LAND WAS WRONGFULLY DENIED AND THAT PATENT OUGHT NOT TO HAVE ISSUED TO THE RAILWAY COMPANY.

In the sequence of argument which seems to us most natural and convenient, we shall first present the considerations and authorities in support of the conclusion reached by the Court of Appeals that the complainant Campbell does not have a status such as enables him to question the patent title in this suit.

As the principal authority for its decision, the Court of Appeals cites the great leading case of Smelting Co. v. Kemp, 104 U. S. 636, 640, 647. In that case Mr. Justice Field said:

> "The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. * * * If in issuing a patent its officers took mistaken views of the law, or

> drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands. Boggs v. Merced Mining Co., 14 Cal. 279, 363. It does not lie in the mouth of a stranger to the title to complain of the act of the Government with respect to it. If the Government is dissatisfied, it can on its own account authorize proceedings to vacate the patent or limit its operation."

But there are other authorities, not referred to by the Court of Appeals, which furnish stronger support for its decision than the case specifically cited in the opinion. The leading case on this question is probably Bohall v. Dilla, 114 U. S. 47, although Sparks v. Pierce, 115 U. S. 408, and Lee v. Johnson, 116 U. S. 48, are cases as closely in point which are cited only less frequently than Bohall v. Dilla. In that case Mr. Justice Field said, on page 51:

> "To charge the holder of the legal title to land under a patent of the United States as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show *that he himself was entitled to the patent from the Government*, and that in consequence of erroneous rulings of the officers of the land department upon the law applicable to the facts found it was refused to him. It is not sufficient to show that there

> may have been error in adjudging the title to the patentee. *It must appear that by the law properly administered the title should have been awarded to the claimant.* Smelting Co. v. Kemp, 104 U. S. 636, 647; Boggs v. Merced Mining Co., 14 Cal. 279, 363. It is therefore immaterial for the decision of this case what our judgment may be upon the conclusion of those officers as to the possession of the patentee."

In Sparks v. Pierce, 115 U. S. 408, 413, it is said:

> "To entitle a party to relief against a patent of the government, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the land department, and being respected, *would have given him the patent.* It is not sufficient to show that the patentee ought not to have received the patent. *It must affirmatively appear that the claimant was entitled to it,* and that in consequence of erroneous rulings of those officers on the facts existing it was denied to him. Bohall v. Dilla, 114 U. S. 47, 51."

In Lee v. Johnson, 116 U. S. 48, 50, the court said:

> "He (the plaintiff) must in all cases show that but for the error or fraud or imposition of which he complains *he would be entitled to the patent.* It is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued. Bohall v. Dilla, 114 U. S. 47; Sparks v. Pierce, 115 U. S. 408."

In Steel v. Smelting Co., 106 U. S. 447, 454, Mr. Justice Field said:

> "So with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the government to which the alienation of the public lands is confided, the remedy of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises *as would give him the title if the patent were out of the way.* If he occupy with respect to the land no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation."

In all of the decisions cited above the conclusions announced represent the unanimous judgment of the court, and we cannot learn that these views have ever been criticised or departed from.

Upon the foundation of these authorities a great body of decisions has been built up in the State and Federal courts, in which the principle that the title derived under patent for land over which the Interior Department has jurisdiction can only be attacked by direct proceeding in equity, and then only at the suit of one who has himself performed all the conditions necessary to entitle him to patent, has been recognized, extended and applied.

In the very recent case of Leonard v. Lennox, 181 Fed. 760, (decided September 21, 1910), Mr. Justice Van Devanter, speaking for the Court of Appeals of the Eighth Circuit, said:

> "When a patent is issued by the officers of

> the land department, to whose supervision and control are entrusted the various proceedings incident to the disposal of the public lands, all reasonable presumptions are indulged in support of their action, and it is only when it is clear that some material error of law, imposition or fraud has resulted in the issuance of a patent to one applicant when it should have been issued to another that the action of those officers successfully can be called in question and the patentee declared a trustee for the unsuccessful applicant and required to transfer the title to him. To entitle an unsuccessful applicant to such relief it is incumbent upon him affirmatively and clearly to show not merely that his claim to the land was older or better than that of the patentee, but that it was such a claim as in law should have been respected by the land department, and, being respected, *would have given him the patent.* * * * *To entitle one to a patent it is essential, among other things, that he comply with all the requirements of the statute under which he seeks the title and the authoritative regulations of the land department thereunder.*"

In Peabody Gold Mining Co. v. Gold Hill Mining Co., 106 Fed. 241, Judge Morrow, after citing and quoting from some of the cases cited above, said:

> "It is alleged that said patent was fraudulently obtained from the land department. * * * But nowhere does it appear that the complainant would have been, at the time of the issuance of the patent, or would now be, entitled to the patent itself. * * * Conceding for the sake of the argument that the complainant could show that the patent should not have been issued to the respondent, this fact would not be sufficient and would not avail without the additional showing that the

patent should have been issued to the complainant."

In Baldwin v. Keith, 13 Okla. 624, 75 Pac. 1124, the syllabus, which is prepared by the court itself, thus states the point decided:

"In an action to declare a resulting trust, where the plaintiff claims the land under the homestead laws, an essential averment of the petition, and one without which the petition does not state a cause of action, is that the plaintiff has resided upon, cultivated, and improved the land *for a period of time and to an extent that upon final proof he would be entitled to a patent thereto.* It is not sufficient that the patentee ought not to have received the patent. It must affirmatively appear from the allegations of the petition that the claimant was entitled thereto, and that, in consequence of the erroneous rulings of the Secretary of the Interior on the facts existing, it was denied him."

In the opinion the court says:

"However, * * * it is quite obvious that the plaintiff in error cannot maintain this action, because of one elementary principle underlying all actions to declare a resulting trust. That is: 'To entitle a party to relief against a patent of the government of the United States, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and being respected, would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. It must affirmatively appear that the claimant was entitled to it, and that, in consequence of the erroneous rulings of those officers on the facts existing, it was denied him.' Bohall v. Dilla, 114 U. S. 47; Sparks v. Pierce, 115 U. S. 408; Parker v.

Lynch et al., 7 Okla. 631, 56 Pac. 1082. If we were to concede that the defendant in error had no right to the patent to the land in controversy, by what right can the plaintiff in error contend that he is entitled to a patent thereto? In the petition it is alleged that he made application to file a contest, which contest was not entertained, but was rejected. * * * Again, he made application to enter the land. *This application gave him no vested right*, and particularly when the land was covered by an allotment entry. But it is alleged that the plaintiff in error established a residence upon the land and made improvements thereon. * * * But, notwithstanding this, still the plaintiff in error cannot maintain this action upon the theory that he had established a residence upon the land, *because he had not resided thereon a sufficient length of time to entitle him to a patent therefor*, even though the defendant in error had had no right whatever to the property. The petition does not contain an allegation that the plaintiff in error resided upon the land for any specific time, other than is shown by a copy of the affidavit which was filed before the Secretary of the Interior on the motion for review. * * * But even were we to look at the facts as shown by the copy of the affidavits contained in the record, still the record shows that the plaintiff in error did not reside upon the land for a period exceeding two years. *This would not entitle him to a patent from the government. He had not resided there a sufficient length of time to enable him to make final proof under the homestead laws, and, not being entitled to a patent from the government, he cannot maintain this action to declare a resulting trust.*"

In Chapman v. Quinn, 56 Cal. 266, affirmed in Quinn v. Chapman, 111 U. S. 445, the case was that of a pre-emptor who settled on the land and while

in residence thereon offered to file his declaratory statement, which was refused on the ground that there was a contest pending between other claimants. This Court afterwards held that this was no ground for refusing to receive Quinn's declaratory statement, but held that the equities were against him. Quinn's status, therefore, was that of a pre-emptioner who was in actual possession of the land, having settled thereon according to law, but whose application to file thereon had been wrongfully rejected by the land office. The court said:

> "The law under which he claims the right to pre-empt the land in controversy declares, among other things: 'That prior to any entry being made under or by virtue of the provisions of this act, proof of the settlement and the improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie.' This proof it is essential the defendant should make before *he* (italics by the court) could be entitled to enter the land; and of this proof the register and receiver are the exclusive judges, subject to the supervision and control of their superior officers of the Land Department. The courts have no power to substitute their judgment upon the facts of the defendant's alleged settlement and improvement of the land for that of the officers to whose judgment Congress has confided the determination of those questions. Cases are numerous in which the equitable rights of persons claiming under the pre-emption laws have been protected by the courts against the legal title acquired by other parties by means of the introduction of false testimony, or other imposition upon the officers of the Land Department, or by the misconstruction by those officers of the law, upon an admitted state of

> facts. But in all of such cases of which we have any knowledge, the party thus protected had connected himself with the title of the government, and thereby acquired some right which, in equity, entitled him to protection. We know of no case where the holder of the legal title under a patent from the government has been compelled by a court of equity to convey that title to one occupying the position of the defendant in the present action. To do so would be to compel the conveyance of the title from the grantee of the government to one who had established no right to purchase the land from the government itself. Nor do any of the cases cited support the position taken by the defendant."

In the course of that opinion the court examined and distinguished a number of the principal cases, most cited as authority, in which the relief sought in the case at bar was granted; showing that in every such case the claimant had himself earned the patent, having performed every act necessary to entitle him to it, and that the land should have been awarded to such claimant in the first instance. This is the distinction which seems to run through all the cases in the books, and is the basis for the rule which the Court of Appeals rightly applied against complainant in the case at bar.

Parsons v. Venzke, 4 N. D. 452, 61 N. W. 1036, affirmed by this court in Parsons v. Venzke, 164 U. S. 89, was a case where the plaintiff's pre-emption final certificate had been canceled arbitrarily and without notice, upon the ground that the pre-emptor had not complied with the law as to resi-

dence and improvements, and patent for the land had been issued to another; and the plaintiff undertook to subject the patent title to his alleged superior claims. The court held that if the entry was improperly canceled, the entryman would be protected in equity, but that it was incumbent upon him to show not only that the cancellation was arbitrary, but also that he himself was entitled to patent, *having earned the land by full compliance with all the requirements of law.* The opinion is a very elaborate one, in which many authorities are cited and examined, and in the course of it it is said:

> "Moreover, arbitrary action of the Department in cancelling the entry would not of itself entitle the plaintiff to the relief he seeks. He invokes equity to decree *that he is in equity entitled to the legal title. His position is that he had earned it.* and that the government held it in trust for him, and that the government's grantee also holds it impressed with such trusts. It is not the certificate which entitles him to the legal title. The right to the title comes from compliance with the law. * * * By showing that he had no opportunity to be heard before the Department, the entryman makes out a case for a hearing in court; but as he assumes the attitude of complaining of the action of the Department, he must show that it operated to his prejudice. As he is in the position of claiming the legal title, he must *prove by evidence that he has fully earned the same by an honest compliance with the law. The burden is on him.*"

Power v. Sla, 24 Mont. 250, 61 Pac. 468, presents a very careful opinion in which a large number of

authorities are examined. The court says:

> "It is incumbent upon them (the claimants against the patent) to show such facts as that it will appear therefrom that they have connected themselves with the original source of title in the government, and that their rights are injuriously affected by the existence of the patent. They must show such equities in themselves as will control the legal title in plaintiff's hands. (Citing numerous cases, including the decisions of this court previously cited in this brief.) Making the statement in another form, the defendants stand in no attitude to question the title of plaintiffs unless by their allegations they present facts showing not only that at the time the patent was issued to plaintiffs they (plaintiffs) were not entitled to it by reason of their failure to perform the conditions required by law, *but also that they themselves have performed all the conditions necessary to entitle them to demand a patent from the government.* The rule is deduced from the cases cited, that after the patent has passed to the entryman, mere strangers will not be heard to question the validity of the proceedings by which the patent was obtained. In such cases the government only can contest its validity in proceedings properly brought to set it aside. * * * The answer, therefore, fails to show that defendants so connected themselves with the government that they may assert title in themselves at the time plaintiff's patent was issued, and that their rights have been injuriously affected by an erroneous application of the law by the officers of the Land Department."

In Parker v. Lynch, 7 Okla. 631, 56 Pac. 1082, 1091, Parker, the complainant, had filed an application to contest the homestead entry of defendant, which application was erroneously denied. It was conceded that the defendant's entry was in fact un-

lawful, and that if Parker had been permitted to contest the entry, as he was legally entitled to do, he would have prevailed and would himself have secured the land under the homestead law. But he was denied relief; and the court, fortifying its opinion by liberal quotations from Bohall v. Dilla; Sparks v. Pierce; Lee v. Johnson, and Smelting Co. v. Kemp, *supra*, including all the language quoted from those decisions elsewhere in this brief, said:

> "The real question is, what right has Parker in this land? In order to win he must have a better equity than Lynch. He must have had an interest in the land that would have ripened into a title if the law had been properly administered. It is not sufficient for him to allege that Lynch was disqualified. * * * One who has no interest in the land cannot complain, because he could not be injured by the action of the Government in issuing a patent for the land to another."

Small v. Rakestraw, 28 Mont. 419, 72 Pac. 746, 748, affirmed by this court in Small v. Rakestraw, 196 U. S. 403, was a case very similar in many respects to Parker v. Lynch. The court there cited and applied the rule of Bohall v. Dilla, Smelting Co. v. Kemp, and Boggs v. Merced Mining Co., and quoted from Bohall v. Dilla the precise language which is quoted elsewhere in this brief. And the same rule was declared and applied, on the authority of the same cases, in Graham v. Great Falls Water Power Co., 30 Mont. 393, 76 Pac. 808, and in Gebo v. Clarks Fork Coal Mining Co., 30 Mont. 87, 75 Pac. 859. In the latter case the court said:

> "The very foundation of the rule is that the patent was issued to another when plaintiff was justly entitled to it. Then the complaint must show such facts as that it will appear therefrom that she has connected herself with the original source of title in the government, and that her rights are injuriously affected by the existence of the outstanding patent. She must show such equities in herself as will control the legal title in the defendant's hands. Power v. Sla, 24 Mont. 243, 61 Pac. 468; * * * She must show affirmatively that upon her part she did or offered to do *all that was necessary to be done in order to secure the patent*, and upon the doing of which patent should have issued to her, Bohall v. Dilla, 114 U. S. 47; and these in addition to the facts necessary to be shown in order to entitle her to make the filing in the first instance."

A recent case very much in point is Pierson v. Loveland, 16 Idaho, 628, 102 Pac. 340. That case deals with the disposition of certain Carey Act lands by the State Board of Land Commissioners, but, as will be seen from the opinion, the principles applied are those which control the disposition of the public lands of the United States. It appears that Loveland made an entry of the land in controversy but failed to comply with the law, so that his rights became forfeited; whereupon Pierson duly initiated a contest against Loveland's entry and applied to enter the land on his own behalf. The Board of Land Commissioners refused to consider Pierson's contest and rejected his application to enter. Pierson appealed from this decision of the Board, but the court held that an appeal from such a decision would not lie, and that his remedy was

by mandamus to compel the Board to hear his contest and allow his application. Meanwhile, the Board issued a patent for the lands to Loveland's assignee. Before patent was issued Pierson settled on the land, built a house thereon, cleared and cultivated a considerable area, and maintained actual residence thereon until forcibly ejected by Loveland's assignee. After patent had issued Pierson brought a suit in equity to have the patent title impressed with a trust in his favor. The court held that Pierson's contest was well brought and should have been entertained by the Board; that Loveland's entry was forfeited and should have been cancelled under that contest; that Pierson's application to enter the land should have been allowed by the Board; and that had he pursued the proper remedy, by mandamus to compel the Board to act on his contest and application, he must have prevailed—in short, that the Board committed an error of law in rejecting Pierson's contest and application and in awarding the land to Loveland's assignee and issuing the patent to him. Nevertheless the court held, following and applying the rule of the authorities cited above, that Pierson had no standing to question the patent title. It is said:

> "The question for determination is, does the complaint state a cause of action? It is well settled that in an action of this kind, to entitle a party to relief he must show a better right to the land than the patentee, such a right as should have been respected by the officers of the Land Department, and being respected would have given him the patent. Facts sufficient must be alleged to show *that the claim-*

ant was entitled to the patent and that in consequence of erroneous rulings of the land officers on questions of law, the patent was denied to him. It must contain allegations showing *that the plaintiff has done all of the acts required by law to be done and performed in order to entitle him to the patent*, or, at least, all of the acts which were in his power to do that were required by the law to be done, and offered to do any and all acts required by the law to be done, which he was prevented from doing by reason of the errors of law committed by the officers of the Land Department. It is admitted that the plaintiff was prevented from a hearing on his contest because of an error of law committed by the State Board of Land Commissioners. * * * After the plaintiff's contest was dismissed by said Board, he took an appeal from that action of the Board to the District Court. * * * In that appeal the plaintiff pursued the wrong remedy. * * * Had the plaintiff proceeded in that way (by mandamus) his rights could have been fully protected. As he failed to do that, he has failed to do all that he might have done to protect his rights. * * * He not only failed and neglected to proceed as above indicated, but his counsel admit *that he failed to procure a water right and failed to offer final proof for said land.* As he neglected and failed to do and perform those things, he is not in a position to maintain this action, for under the well settled rule of law in this class of cases, the plaintiff must allege *the performance of all the acts required by law necessary to show that he was entitled to the patent at the time the action was commenced*, with the exception of those acts which he was prevented from performing or offering to perform by reason of the error of law committed by said Board. In Bohall v. Dilla, 114 U. S. 47, the court had under consideration a case something like the one at bar, and said: (The court then quotes from Bohall v. Dilla the

identical language quoted from that opinion on a preceding page of this brief). Even if the State Board had not made an error of law, it does not appear from the allegations of the complaint that the appellant would have been entitled to receive a patent for said land at the time patent was issued to Diehl, he not having complied with the part of the law requiring him to present his final proof showing certain facts, and showing that if he had not complied fully with the law that his reason for non-compliance was the errors in law committed by the Board in granting said extension of time. The case of Sparks v. Pierce, 115 U. S. 413, involved the question of relief in equity against a patent issued by the United States: (Here follows a quotation of the same matter quoted from Sparks v. Pierce earlier in this brief). In support of that rule, the court cites Bohall v. Dilla, 114 U. S. 47. See also Quinn v. Chapman, 111 U. S. 448; Lee v. Johnson, 116 U. S. 53; Cunningham v. Ashley, 14 How. 379; Parker v. Lynch (Okla.) 56 Pac. 1082; Baldwin v. Keith (Okla.) 75 Pac. 1124; Jameson v. James (Cal.) 100 Pac. 700."

It will be noted that the Idaho court held that Pierson failed to comply with two different classes of requirements necessary to be observed in order to give him a status which would enable him to attack the patent, viz.: not only in his failure to pursue the proper remedy to compel the Board of Land Commissioners to hear his contest and receive his application, but also in his failure to make proper final proofs and to obtain a water right—although it is plain that he was deterred from doing these latter things by the refusal of the Board to recognize his claim. And it was held that a failure in either respect was enough to bar an attack upon

the patent title, even had the other requirement been complied with. This answers the suggestion, should it be made, that the rejection of his initial application to purchase the land relieved Campbell from the duty of offering proofs and payment, because such offer would be useless in the face of the refusal of the officers of the Land Department to entertain the application. This is a phase of the subject which will receive further consideration elsewhere in this brief.

In Deweese v. Reinhard, 61 Fed. 777, decided by the Circuit Court of Appeals for the Eighth Circuit and affirmed on another ground in Deweese v. Reinhard, 165 U. S. 386, Judge Thayer says:

> "At the threshold of this case we are confronted with the question whether the appellant stands in such privity with the United States as entitles him to maintain a suit to annul the certification of the land in dispute to the State of Nebraska, which act on the part of the Secretary of the Interior had the legal force and effect of a patent. * * *We do not dispute the general proposition that a person becomes the equitable owner of a tract of land forming a part of the public domain, if it has been surveyed and placed on the market, when he makes prior settlement thereon under the pre-emption or homestead laws of the United States, *and subsequently complies with all of the terms and conditions of those laws which entitle him to a patent.* It may also be conceded that the right of a homestead or pre-emption claimant to a patent, *when he has made a lawful settlement and done everything required of him to perfect his claim*, cannot be prejudiced either by the intentional misconduct of the officers of the Land Department

> or by their mistakes of law or neglect of duty. Moreover, it may be admitted that the holder of an equitable right or title to a tract of land which has been acquired in the manner aforesaid by a lawful settlement thereon, *and by the performance of such other acts as the law prescribes to entitle a settler to a patent*, stands in privity with the government, in such sense that he may maintain a bill to cancel a patent erroneously issued to a third party for the same land after the settler's rights had become vested."

In Hartman v. Warren, 76 Fed. 157, 163, Judge Sanborn, speaking for the Court of Appeals for the Eighth Circuit, said:

> "Can one who has acquired no right to a tract of land maintain a suit in equity to charge the owner of it with a trust in his favor, because the United States sold and granted it to that owner through an error of law? This is the next question in this case, and it is not a new question in this court. It was carefully considered and answered in the negative in the case of Deweese v. Reinhard, 61 Fed. 777."

Then after some discussion of the authorities the learned judge quoted from Smelting Co. v. Kemp, 104 U. S. 636, 647, the language quoted from that case on a preceding page of this brief, and continued:

> "*This is a wise and salutary rule. It relieves the government of the expense of vexatious litigation, and the owners of the land from the speculative attacks of those who have nothing to lose.* It has been repeatedly announced and uniformly maintained in the national court, and it is fatal to the suit of appellant in this case."

The Circuit Court of Appeals for the Ninth Circuit, in American Mortgage Co. v. Hopper, 64 Fed. 553, 556, an opinion in which Mr. Justice McKenna concurred, said:

> "The appellees relied upon the patent from the government of the United States. The suit is brought to obtain a decree declaring that the appellant is entitled to the patent, which was issued to appellee Hopper. To entitle it to this relief it was essential for it to *affirmatively show* that if the law had been properly administered *the title would have been awarded to it*. The suit cannot be maintained simply upon a showing that the land department erred in adjudging the title to the patentee. These principles are well settled, both in this court and in the Supreme Court of the United States."

In Sacramento Savings Bank v. Hynes, 50 Cal. 195, the defendant alleged, as an equitable defense in a suit founded upon a patent title, that he had the superior right to the land because he had entered it under the pre-emption law and had complied with all of the requirements of that law, except those relating to proof and payment; and that he had *offered* to make proper final proof and payment, but was wrongfully refused permission to do so. The court said:

> "The defendant cannot maintain the position that he is entitled in equity to the legal title which was acquired by the plaintiff, unless he, the defendant, *complied with the provisions of the pre-emption law applicable to his case*, or was prevented from so doing by some act by means of which the plaintiff acquired an undue advantage in the proceeding. Among others is the provision that the claimant must

> prove, to the satisfaction of the register and receiver, the facts upon which his claim rests. The allegation of the equitable defense that when the defendant appeared before those officers to prove his right of pre-emption, he was not permitted to make such proof because of the 'wrongful and fraudulent acts of the plaintiff,' is not the allegation of any fact which caused or induced those officers to refuse to hear his proofs. The allegation is too vague to be considered as the allegation of a fact."

Wirth v. Branson, 98 U. S. 118, is one of the cases in which the complainant was held entitled to relief. That case was decided before the rule upon which we rely had been declared and defined by this court in such cases as Smelting Co. v. Kemp, Bohall v. Dilla, Sparks v. Pierce, and Lee v. Johnson. But even then the limitation upon attacks on the patent title, with respect to the status which the complainant must occupy in order to maintain a suit of this character, was recognized by the court, as will appear by the following extracts from the opinion, which was by Justice Bradley:

> "The rule is well settled by a long course of decisions that when public lands have been surveyed and placed in the market or otherwise opened to private acquisition, a person *who complies with all the requisites necessary to entitle him to a patent* in a particular lot or tract is to be regarded as the equitable owner thereof. * * * This was laid down as a principle in the case of Lytle v. Arkansas, and has ever since been adhered to. See Stark v. Starrs, 6 Wall. 402. Subsequent cases which have seemed to be in conflict with these *have been distinguished from them by the fact that something remained to be done by the claimant to entitle him to a patent, such as*

the payment of the price, the payment of the fees of surveying, or the like. The proper distinctions on the subject are so fully stated in the cases of Stark v. Starrs, Frisbie v. Whitney, The Yosemite Valley Case, Railway Co. v. McShane, 22 Wall. 444, and Shepley v. Cowan, 91 U. S. 330, that it would be supererogation to go over the subject again."

There are a great many cases in the books, in addition to those already referred to, which in some form or other recognize the rule that the patent title to land over which the Interior Department had jurisdiction can only be attacked or questioned by direct proceeding in equity, and then only at the suit of one who has himself performed all the conditions entitling him to patent for the land. Some of these are cases where the complainant was held entitled to the relief sought, but where the rule stated was expressly recognized by the court; others are cases where complainant was denied relief under this rule, although the decision might have been put on a different ground; and still others are cases in which the facts were such that the rule was properly applied. But everywhere the rule has been accepted by the courts, and we have found no case in which it has been criticized or in which an attempt has been made to limit the rule or restrict its operation. The authority of Smelting Co. v. Kemp, Bohall v. Dilla, Sparks v. Pierce, and Lee v. Johnson has been universally acknowledged, and we cannot learn that the correctness of those decisions has ever been doubted or denied by any court of last resort. The length

to which we have already gone forbids further quotation from or discussion of the authorities on this point. We cite below a few additional cases to the same effect which are quite closely in point; but there are many others of more or less direct bearing which we think it unnecessary to give specific reference to:

Jameson v. James (Cal.) 100 Pac. 700.

Boggs v. Merced Mining Co., 14 Cal. 279.

Doll v. Meador, 16 Cal. 295.

Manning v. San Jacinto Tin Co., 9 Fed. 726.

Savage v. Worsham, 66 Fed. 852.

Carr v. Fife, 44 Fed. 713; affirmed in Carr v. Fife, 156 U. S. 494.

Johnson v. Fleutsch, 176 Mo. 452; 75 S. W. 1006.

Bangs v. Stephenson, 63 Mich. 661, 669; 30 N. W. 317, 320.

Janes v. Wilkinson, 2 Kan. App. 361; 42 Pac. 735, 737.

Frisbie v. Whitney, 9 Wall. 187.

The Yosemite Valley Case, 15 Wall. 77.

There are, of course, numerous cases in which the complainant has been held entitled to relief, or an equitable defense has been sustained, where one entitled to public land was deprived of patent thereto by fraud or mistake, or by errors of law on the part of the officers of the Land Department, and thereafter appealed to a court of equity for a decree subjecting the patent title to his superior equi-

table rights. But, as pointed out in several of the authorities cited above, in every case where such relief has been granted against the patent title, the complainant had performed every act necessary to entitle him to patent, so that nothing remained to be done as between him and the government, to completely earn the land; every condition precedent to the issuance of patent to him having been complied with before commencement of the suit.

In a sincere effort to exhaust the authorities on the subject, we have examined a great many cases in which the equitable claims of the complainant have been held superior to the patent title; but we have found no such case where anything remained to be done on the part of the complainant to entitle him to patent. Some of the cases may possibly convey a different impression on surface reading; but every such case will be found, upon analysis, to present the conditions indicated. We shall refer to and explain a few of the best known and most cited cases of this character, although these represent a very small proportion of those which have been examined and which fall within the definition given above.

Johnson v. Towsley, 13 Wall. 72, is probably the leading case. Towsley, the original complainant, entered the land under the pre-emption law, complied with all the requirements of the law as to residence, cultivation and improvement, made proper final proofs, paid the purchase price, and received the final certificate; so that patent would have been

issued to him in the regular course without any further act on his part. His entry was, however, contested by Johnson, who prevailed in the Department and was awarded the patent under a view of the law which the court afterwards held to be erroneous. Towsley remained in possession of the land at all times, and was evidently in possession thereof at the time he brought suit against Johnson. It will be seen, therefore, that Towsley's equitable title was complete, and that nothing whatever remained to be done to entitle him to patent. Cornelius v. Kessel, 128 U. S. 456, and the great case of Lytle v. Arkansas, 9 How. 314, were pre-emption cases where the conditions were very similar to those considered in Johnson v. Towsley.

Lindsey v. Hawes, 2 Black, 554; McCord v. Hill, 111 Wis. 499, 84 N. W. 27; Bogan v. Edinburgh Land Mortgage Co. (C. C. A. 8th Cir.), 63 Fed. 192; and George v. Riddle, 94 Fed. 689, are cases somewhat resembling Johnson v. Towsley and Cornelius v. Kessel. In each of these cases the complainant complied with all the requirements of law and his proofs and payment were accepted by the Land Department and final certificate issued to him; but the certificate and entry were afterwards wrongfully cancelled by action of the Department and patent erroneously issued to another.

In Tarpey v. Madsen, 178 U. S. 215, Madsen was the grantee of a railway company, which was entitled to the land under its grant, the Department having erroneously issued patent to a homestead claimant. This court held that patent should have

been issued to the railway company, and upheld a decree for Madsen, its grantee. All of the conditions of the grant had been complied with, and the railway company was entitled to patent without any further act on its part.

In Germania Iron Co. v. James, (C. C. A. 8th Cir.) 89 Fed. 811, and James v. Germania Iron Co., (C. C. A. 8th Cir.) 107 Fed. 597, the complainant had entered the land with a Porterfield land warrant. He made proper application, paid the fees required by law, and turned in his warrant; and the application, payment and warrant were duly accepted and the entry allowed by the local land officers. Nothing, therefore, remained to be done to entitle him to patent.

Ard v. Brandon, 156 U. S. 537; Brandon v. Ard, 211 U. S. 11; Duluth & Iron Range Co. v. Roy, 173 U. S. 587; Nelson v. Northern Pacific, 188 U. S. 108; Osborn v. Froyseth, 216 U. S. 571, and Trodick v. Northern Pacific (C. C. A. 9th Cir.), 164 Fed. 913, are cases of homestead claimants who made actual settlement on the land and complied in good faith with all the requirements of law respecting residence, improvement and cultivation, so as to fully earn the land under the homestead law, and who remained in possession of the land at all times up to the commencement of suit. The facts of the Wass case put it in this category, also.

Oregon & California Railway Co. v. United States, 189 U. S. 103, and 116, were cases where the Government brought suit for the benefit of settlers who were in precisely the same position.

The distinction between cases like Ard v. Brandon and cases like the one at bar, and the fact that the doctrine of Ard v. Brandon is applicable only to the case of a bona fide settler in actual occupancy of the land, is quite clearly pointed out in the following decisions of the Secretary of the Interior, rendered while Mr. Justice Van Devanter was Assistant Attorney General for the Department, and initialled in a manner which indicates that the opinions were prepared or approved by him.

Tubbs v. Northern Pacific Railway Co., 27 L. D. 86.

Drew v. Northern Pacific Railway Co., 27 L. D. 310.

Olesen v. Simonson, 27 L. D. 689.

In Duluth & Iron Range Co. v. Roy, *supra*, Roy, the claimant, had not completed his full five years' residence and cultivation at the time patent was issued to his adversary, and it was held that this was not fatal to his suit; the court declaring that it is not essential that at the moment of time the patent issues, the claimant should have so far completed his performance as then to be immediately entitled to patent. But in that case it appeared that after the patent issued Roy continued to reside upon, cultivate and improve the land, and that the full five-year period elapsed before the suit was commenced; so that *at the time the suit was brought* Roy had fully earned the land under the homestead law. Therefore, the Roy case is right in line with Ard v. Brandon and other cases cited

in a preceding paragraph, and is perfectly consistent with the authorities previously referred to in this brief. The Roy case is distinguished upon this general ground in United States v. Chicago, Milwaukee & St. Paul Railway, 195 U. S. 524, 539.

In some of these homestead cases the settler was not permitted to make final proofs, and in one or two cases the settler was deterred by the erroneous action of the officers of the Land Department from filing his preliminary application in the mode prescribed by law. But in all such cases the settler offered or attempted to do the thing omitted, and was prevented from doing so by error of the land officials; and the thing was held immaterial in view of the fact that the claimant had made full compliance with the law in respect to residence, improvement and cultivation, and was then actually occupying the land in good faith as his home. Moreover, the requisite proofs were in fact made as part of the evidence in the suit to establish the rights of the claimant. We think it clear that in each of those cases the claimant had really done everything necessary to entitle him to patent; but if those cases may be regarded as a relaxation of the strict rule, it was a relaxation only in favor of an actual settler who had fully performed the conditions necessary to the acquisition of a home; and reason for this is found in the familiar principle that the law deals tenderly with the settler who in good faith establishes his home upon the public lands and conforms to all the substantial demands

of the law, viz.: those which call for occupation, cultivation, improvement and continuous residence.

In Morrison v. Stalnaker, 104 U. S. 213, Cunningham v. Ashley, 14 How. 377, and Hess v. Bolinger, 48 Cal. 349, the claimant was a qualified pre-emptioner who had settled on the land under the pre-emption law and complied with all the requirements of that law as to residence, improvement and cultivation, and had duly made his final proofs and *tendered* payment of the purchase money, but such tender was refused by the land officials under error of law. In those cases it seems to have been assumed, without discussion, that under the circumstances there shown such tender was equivalent to payment, and the claimant was given relief in equity notwithstanding the tender was not accepted. But in every such case an actual tender of the money was clearly and unequivocally proved, and the claimant was further supported by the fact that he had in all other respects complied with the statute and was an actual settler on the land, which he had cultivated, improved and resided upon in conformity to law, and had made the required proof thereof.

There is as much reason for special leniency towards the actual settler under the pre-emption law as towards him who claims under the homestead law. The courts have never made any distinction between the two, but have ever shown favor and tenderness towards the rights of both. And this may be the reason why a mere unaccepted ten-

der of payment has sometimes been held sufficient in the case of a pre-emptioner, just as an unaccepted offer of proofs has been held good in the case of a homesteader, where the complainant was an actual settler in good faith, who had fully satisfied all other conditions, and who was then in residence upon the land.

For we have found no other case where a mere tender of payment or performance has been held sufficient to give the claimant standing to question the patent title. No court, so far as we know, has ever granted this extraordinary equitable relief to a would-be purchaser, not a settler upon the land, who had not paid the purchase money due to the United States under the law, on the ground that payment was excused by tender and refusal. In some cases it is intimated, *obiter dictum*, that tender might be as good as performance to give the status necessary for an attack upon the patent title; but we cannot find that it has ever been so held by any court, except in favor of an actual settler who had in all other respects complied with the law, and then only to the extent indicated in the decisions already cited.

And in no case has anything less than actual affirmative tender of the money been held sufficient to give the complainant the requisite standing against the patent, where his claim was made under a law calling for the payment of a purchase price to the government. The courts have yet to find a cause sufficient to excuse actual tender of the money, in cases where payment is not made and

where a right is claimed thereunder as a basis for an attack upon the patent title.

Now we may well concede that even under the timber and stone act, a tender of the purchase money, accompanied by an offer of proper final proofs, which is rejected by the land officials, is enough to give the complainant that privity with the Government which is essential to the maintenance of a suit to control the patent. In this case the complainant Campbell rested upon the rejection of his application, and made no effort whatever to comply with the law with respect to proof and payment. It is not pretended that he made any attempt to tender the purchase money or the required proofs; nor is it even claimed that he was prevented from doing so by any action of the officials of the Land Department. Indeed, a peculiar weakness of Campbell's case is that there is neither allegation nor proof that he was ever *able* to pay the purchase money or make the necessary proofs.

The theory upon which Campbell proceeds is that, his application having been rejected, it was unnecessary for him to go further; that the rejection of the application indicated that had proofs and payment been tendered the tender would *probably* have been refused; and that such rejection excused him from making any further offer of payment or performance.

That theory is incorrect in law, as we have

shown. It is not at all certain that even a tender of proofs and payment would have been enough to give complainant's claim the required status, but it is perfectly clear that nothing less than an actual tender is sufficient. There is no presumption that the land officials would not have done their duty—it cannot be assumed, as a matter of law, that they would not have accepted a proper tender properly made. Indeed, if we may conjecture as to the possible event, the acceptance of a similar tender in the Hoyt case makes it seem very probable that such a tender would have been accepted in the Campbell case also. But of course this is immaterial, for the question is not one to be tested by ordinary rules of conduct nor by principles of law applicable to ordinary commercial transactions. It is a question which must be determined in the light of the rules that have been built up for the safety and protection of those holding under patent from the Government; and in the light of those rules it is manifest that complainant has not performed those conditions necessary to give him standing to attack the patent title.

Let us not be misunderstood. We do not find it necessary to argue that if Campbell had gone into the Land Office prepared to furnish the proofs and make the payment required by law, and had failed then to make a formal production of his proofs or to offer his money across the counter, because deterred from doing so by some action or declaration of the local officers, his rights would be prejudiced by the omission, under those conditions, to make

an actual tender, in technical form. We may well concede that, under the circumstances supposed, the formal offer, in express terms, of money and proofs would be held excused. But we insist that in a case like this there must at least be some act which is practically equivalent to an actual offer or endeavor to comply with the law. And there is nothing of the sort, nor anything remotely resembling it, in the case before the court.

There is nothing in Campbell's situation which entitles him to particular consideration from a court of equity or which furnishes any reason for special leniency towards his failure to perform the prescribed conditions. Campbell was not a settler, but a speculator. He never lived upon the land and never intended to do so. He risked nothing, paid nothing, invested nothing. His only expenditure of time or money has been in the litigation conducted by him in the Department and the courts.

Campbell's position is very different from that of a settler who has spent several years of his life in establishing a home upon a tract of public land, and who has put his savings and the fruit of his labor into buildings and other improvements, and has enhanced the value of the land by clearing and cultivation; especially one who has done this in ignorance of adverse claims and in the honest belief that the land was subject to his entry—which was

true of the successful complainant in most of the cases cited above.

Campbell was a mere speculator, and he had full knowledge of the Railway Company's rights. He made his initial application, and conducted his contest in the Department, well knowing that the land had previously been selected by the Railway Company, in the hope that such selection would be defeated in law and the land be subjected to his entry. He went into the venture with eyes open and with full knowledge of its hazards. Had he done so in the honest effort to secure and establish a home, we might feel some sympathy for him. As it is, he is entitled to no more consideration than any other unsuccessful speculator.

In this connection the language of Mr. Justice Brewer in Moss v. Dowman, 176 U. S. 413, 417, and in Gertgens v. O'Connor, 191 U. S. 237, 246, in each case expressing the unanimous judgment of the court, is especially pertinent. In Moss v. Dowman, Mr. Justice Brewer said:

> "While undoubtedly under the provisions of the statutes and the regulations of the Land Department there are at times opportunities for a speculator to obtain title to public lands, it must be always remembered that *in the eye of the public land laws of the United States the speculator is never an object of favor.*"

And in Gertgens v. O'Connor, he said:

> "It is well to look further into his (the settler's) equities. It will be borne in mind that he did not go on the land until April, 1891. The tract was within the indemnity limits of the company's grant, and was therefore subject to selection. It had been withdrawn from

> entry under the land laws, and that fact appeared on the records of the local land office. It had in fact been selected by the Company, and that selection had not been cancelled. * * * He does not come within the letter of the statute, nor does he come within the reach of any reasonable equities. *He evidently took his chances on the possibility of the Company's failing to obtain title and a subsequent failure of Ireland to insist upon his preferential right of purchase. He went upon the land with full knowledge of all the facts, which showed that he had no right to enter, speculating upon possibilities which have not been realized, and having so speculated, he cannot complain if he suffer the consequences which often attend the failure of a speculation.*"

In Gertgens v. O'Connor the claimant to whom the quoted language applies was an actual settler who had cultivated and improved the land. The reasoning of that case therefore applies with greater force to a speculator like Campbell, who put nothing at risk and sustains no loss through his failure to acquire the land, except the loss of a profit he might have made.

In Manning v. San Jacinto Tin Co., 9 Fed. 726, 732, cited on a preceding page of this brief, the court said:

> "But complainant has no standing to impeach the transaction on another ground. He has no apparent title from the United States. His right, whatever it may be, is at best, only inchoate. It is a mere privilege; a first right to purchase or pre-emption right under the acts of Congress, of which he may avail himself or not as he chooses if he should succeed in vacating the patent. *He is not bound to pur-*

> *chase of the Government, and may abandon his claim at any moment. Neither he nor his grantor has ever tendered the purchase money to the United States* or to defendant, or applied for a patent, and it so appears in the bill, and *non constat* that he ever will do either. He is in no better poition as regards title, in his relation to the Government, than the parties in Hutton v. Frisbie, and Frisbie v. Whitney, 9 Wall. 187. Complainant as yet has no privity with the government in the lands in dispute, and no ground for equitable relief on that score. Doll v. Meador, 16 Cal. 295."

This language is singularly apposite to the case at bar. Like the complainant in that case, Campbell "has never tendered the purchase money to the United States." Like that complainant, "he is not bound to purchase of the Government, and may abandon his claim at any moment." To give Campbell in this suit the benefit of the patent which was granted by the Government to the Railway Company, under which defendants now hold, is to give him something which he never paid for and never tendered payment for; to give him the benefit of an *option*, a speculation, in which he never put a penny at risk, and from which he might have withdrawn at any time, and may still withdraw, without having invested or lost a dollar, should events occur (such as the destruction by fire of the timber on the land) which would make the speculation appear unprofitable. This is something a court of equity should not do. In this view also, the fact that Campbell has not alleged or proved that he was ever prepared to make actual payment of the purchase money is quite significant.

Campbell cannot complain that there is anything novel in the doctrine which forbids him from maintaining this suit. For years the decisions of the Land Department have marked a clear distinction between the rights of an applicant under the timber and stone law whose application is rejected or suspended, and who makes no further effort to comply with the law, and the rights of one who, notwithstanding such rejection or suspension, offers the proper proof and tenders payment of the purchase money, even though the tender is refused. And those decisions, read in the light of the rule established by this court in such cases as Smelting Co. v. Kemp, Bohall v. Dilla, Sparks v. Pierce and Lee v. Johnson, made it absolutely plain that if Campbell would thereafter appeal to a court of equity to subject the patent title to his alleged superior claims, he must establish his status by making the necessary proof and payment, or at least by making an actual unqualified tender thereof. This Campbell did not do, and the omission is fatal to his suit, even if all other questions might be resolved in his favor.

Burns v. Bergh's Heirs, 37 L. D. 161.
Heirs v. William Friend, 5 L. D. 38.
Capprise v. White, 4 L. D. 176.
California v. Nickerson, 20 L. D. 391.
Board of Control v. Torrence, 32 L. D. 472.
Jones v. Northern Pacific, 34 L. D. 105, 111.

If there is any seeming harshness in this rule, it is more apparent than real. The remedy of a suit in equity to control the patent title is an extraordinary remedy, which is not founded on statute, but which has been built up by the courts, year by year, decision by decision. It is extraordinary in that it permits re-examination of a final adjudication by the tribunal which is vested with the jurisdiction to determine the very questions thus re-examined. And as the courts have built it up by their decisions, so they have defined it and limited its scope. Manifestly, it would not do to extend this remedy to all cases where an individual might find it to his interest to challenge a patent issued to another. Its use must be limited to those having a real and definite interest to be protected; such an interest as courts of equity generally take cognizance of. And so it was established that the remedy might be invoked only by one whose equitable interest was of a dignity equivalent to that of ownership. It was necessary that the line should be drawn somewhere, and it has consistently been drawn against claims which have not been carried far enough to give a right to patent. Again and again it has been held that the patent could be attacked in this manner only by one who was himself entitled to patent. The rule is firmly established, and it has never been departed from. And who shall say that it is not a just and reasonable rule?

But whatever may be said with respect to the propriety of the rule— *it is the law!*

In delivering the opinion of the Court of Appeals in the case at bar, Judge Sanborn well said:

> "The indispensable basis of a suit in equity to charge the legal title to land under a patent is an equitable interest in the land in the complainant which is superior to the legal title in the defendant. The right under the general land laws of every qualified citizen to enter any tract of land open to entry thereunder is not, and no one can convert it into, such an interest in land by making an application to purchase which the officers of the Land Department unlawfully deny. The right to allowance of such an application is a privilege merely, and not an equitable interest or title. The applicant acquires no equitable interest in the land by his application and its denial, and in the absence of such an interest no suit in equity can be maintained. * * * The applicant pays nothing for the tract he is refused permission to buy, his loss by the refusal is measurable in damages, he may purchase another tract, *and if courts of equity should entertain suits upon such applications and denials, they would become courts for the production, rather than the prevention, of a multiplicity of suits.*"

We are left in some doubt as to the position of complainant's counsel with respect to the point now under discussion. But their arguments in the Court of Appeals and on the former hearing in this Court, considered in the light of the assignments of error filed in the Court of Appeals on the appeal to this Court (Record, p. 190), indicate that counsel hold that if Campbell is not entitled to a decree adjudging defendants to hold the patent title in

trust for him (and we surmise that this will be conceded in the light of the authorities marshalled above), he is at least entitled to a decree cancelling the patent and permitting him to complete and perfect his entry.

This was undoubtedly the theory upon which the suit was brought, since it is the specific relief prayed in the bill of complaint (although it is true that the prayer for general relief would have entitled complainant to a broader decree if warranted by the facts and the law), and it was the theory upon which his counsel presented his case to the Court of Appeals.

But if complainant is not entitled to a decree declaring the patent title impressed with a trust in his favor and requiring the defendants to transfer the title to him, or something of equivalent import, then he is not entitled to a decree at all. For it is well settled that a suit to cancel the patent and restore the land to the jurisdiction of the Land Department cannot be maintained by an individual, but only by the Government itself.

The rule is exactly stated by Judge Morrow of the Ninth Circuit in Peabody Gold Mining Co. v. Gold Hill Mining Co., 106 Fed. 241, 243, thus:

> "The mere cancellation of the patent with the reversion of the land to the Government is not within the province of a private party to effect by a suit in equity; that privilege rests only with the Government."

The first case in which this question was discussed seems to be Silver v. Ladd, 7 Wall. 219, 228, where Mr. Justice Miller said:

> "The relief given in this class of cases does not proceed upon the ground of annulling or setting aside the patent wrongfully issued. That would leave the title in the United States, and the plaintiff might be as far from obtaining justice as before. And it may well be doubted whether the patent can be set aside without the United States being a party to the suit. The relief granted is founded on the theory that the title which has passed from the United States to the defendant, inured in equity to the benefit of plaintiff, and a court of chancery gives effect to this equity."

In Smelting Co. v. Kemp, 104 U. S. 636, 647, Mr. Justice Field said:

> "It does not lie in the mouth of a stranger to the title to complain of the act of the Government with respect to it. If the Government is dissatisfied, it can on its own account authorize proceedings to vacate the patent or limit its operation."

In Steel v. Smelting & Refining Co., 106 U. S. 447, 454, the same great judge stated the point clearly in the following terms:

> "The remedy of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises as would give him the title if the patent were out of the way. If he occupy with respect to the land no such position as this, he can only apply to the officers of the Government to take measures in its name to vacate the patent or limit its operation. * * * This can be accomplished only by regular judicial proceedings taken in the name of the Government for that special purpose."

In Lee v. Johnson, 116 U. S. 48, he said:

> "He (the plaintiff) must in all cases show

> that but for the error or fraud or imposition of which he complains he would be entitled to the patent; it is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the Government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued."

In Carr v. Fife, 44 Fed. 713, affirmed in Carr v. Fife, 156 U. S. 494, Judge Hanford said, of a suit of similar nature:

> "This is not a suit to destroy the title conveyed by the patent. The plaintiff's object is rather to acquire that title for himself. Unless he can succeed in this, it matters naught to him in what manner or to whom the Government disposes of the land."

The most recent authority is Jameson v. James, 155 Cal. 275, 100 Pac. 700. That case is exactly in point. The plaintiffs had initiated a mineral claim to the land in dispute, and had in all respects complied with the law up to the time patent was issued to the defendant; but they had not made the complete compliance necessary to entitle them to patent. It appeared that the patent was obtained by fraud and in derogation of the rights of the plaintiffs. After examining the facts and authorities, the court concluded that the plaintiffs had not made such compliance with the law as to entitle them to control the patent title within the rule of cases like Bohall v. Dilla, Sparks v. Pierce, Lee v. Johnson, and Smelting Co. v. Kemp, *supra*, and then considered whether the plaintiffs were entitled to have the patent set aside in order that they

might complete their claims—which was the relief prayed in the complaint. In this connection the court said:

> "In the case at bar the plaintiffs do not seek to have the defendants held as trustees of the legal title conveyed by the patent. * * * It is not claimed by appellants (plaintiffs) that they * * * occupied 'such a status as entitled them to control the legal title.' They had never performed the acts necessary to vest in them the right to a patent. * * * The plaintiffs, then, not being themselves entitled to acquire title to the land, ask that the patent conveying it to defendant James be cancelled. That a patent obtained by fraud may be so cancelled is well settled; but inasmuch as the party injured by the fraud is the Government, whose title has been improperly obtained, *the action to annul the patent can be maintained by the United States alone.* A complainant in the position of these plaintiffs must, as is said in Steel v. Smelting Co., 106 U. S. 447, 'apply to the officers of the Government to take steps in its name to vacate the patent or limit its operation. This can be accomplished only by regular judicial proceedings taken in the name of the Government for that special purpose.'"

It is suggested in the brief of counsel with whom we are associated that the decision of the Court of Appeals in the Hoyt case rests upon the ground that the acceptance of Hoyt's application, proof and payment deprived the Department of jurisdiction, and that the subsequent approval of the Railway Company's selection and the issue of patent to it were without jurisdiction and absolutely void.

Now if the patent to the Railway Company were void for want of *jurisdiction* in the Department to issue it, it might be attacked collaterally or in an action at law; it is only a patent for land over which the Department had jurisdiction that is impervious to collateral attack and cannot be questioned except by direct proceeding in equity at the suit of one who is himself entitled to patent. And while it is not claimed that the decision in the Hoyt case involves a ruling that the Department was without jurisdiction to approve the selection and issue the patent to the Railway Company in the Campbell case, so that the question is really immaterial in this case, it may possibly cause some misunderstanding; and as it is easily disposed of, it seems best to get it out of the way.

We do not think the Court of Appeals can rightly be understood to have put its decision upon the ground indicated; indeed, it seems to us that this idea is expressly excluded by the language of the opinion itself. See Hoyt v. Weyerhaeuser, 161 Fed. 324, 330. At all events, the theory that the Department can be deprived of jurisdiction by the acceptance of proofs and payment on a claim of this character, or by anything short of the issue of patent itself, is wholly incorrect. It is uniformly held that wherever the Department is vested with authority to receive, consider and pass upon the claims of applicants to a tract of public land, it is deemed to have jurisdiction thereof; and this is only another way of saying that the Department

has jurisdiction over all land constituting a part of the public domain which has not been reserved, withdrawn or previously granted by authority of Congress. And when the jurisdiction of the Department has once attached, it continues until patent has issued. The issuance of patent, or the certification which is the equivalent of patent, is the act which terminates the jurisdiction of the Department. Therefore, in any case where the Department passes upon the conflicting claims of applicants for a tract of public land, and awards patent to one of them, its action, however erroneous, wrongful or mistaken; however arbitrary or contrary to law; is nevertheless a judgment within its jurisdiction, which is impervious to collateral attack and which can be challenged only by direct proceeding in equity.

Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592.

United States v. Schurz, 102 U. S. 378, 402.

Orchard v. Alexander, 157 U. S. 372, 383.

Brown v. Hitchcock, 173 U. S. 473, 477.

Hawley v. Diller, 178 U. S. 476, 488.

King v. McAndrews, (C. C. A. 8th Cir.) 111 Fed. 860, and cases cited.

II.

THE RAILWAY COMPANY'S SELECTION, HAVING BEEN ACCEPTED AND ALLOWED BY THE LOCAL LAND OFFICERS, SEGREGATED THE LAND AGAINST COMPLAINANT'S APPLICATION TO ENTER THE SAME, SO THAT NO RIGHTS ATTACHED UNDER THAT APPLICATION, REGARDLESS OF THE VALIDITY OR INVALIDITY OF THE PRIOR SELECTION.

If the Circuit Court of Appeals was right in holding that complainant is not in position to attack the patent title under which defendants claim, because of his failure to perform the acts necessary to put him in privity with the United States, then his appeal was properly dismissed, even under the theory that the officers of the Land Department erred in rejecting his application to enter the land in controversy. But suppose we pass over that all-sufficient ground of defense and concede that complainant would be entitled to a decree if it could be held that the rejection of his application was an error of law. Under such a concession the case resolves itself into this question: Was the land in suit open to entry and acquisition under the timber and stone act at the time complainant offered his application to purchase the same, and was it then the duty of the officers of the Land Department to accept such application and permit entry and purchase thereunder, notwithstanding the prior selection by the Railway Company?

The Court of Appeals answered that question in the affirmative in the Hoyt case, on the supposed

authority of Sjoli v. Dreschel, 199 U. S. 564. But there is a rule of law not considered in the Hoyt case nor touched upon in Sjoli v. Dreschel which compels a contrary conclusion in the present case. That is the rule, firmly established by the decisions of this court as well as by numerous decisions of the Land Department and of other Federal and state courts, that an entry or selection of public land, accepted or recognized by the local land officers, segregates the land, and so long as it remains uncancelled of record, precludes the initiation of any other claim thereto; whether such entry or selection is regular or irregular, valid or void.

In this case the Railway Company made and filed its application to select the land, and paid the required fees, in exact accordance with the departmental practice and regulations in force at the time, and the same was accepted, approved and allowed by the local officers. This selection stood upon the records, intact and uncancelled, at the time complainant presented his application to purchase the land under the timber and stone act. Therefore, it constituted a complete barrier against complainant's attempt to acquire the land, and his application was rightly rejected by the land officers, even if every objection which complainant now makes against the validity of the Railway Company's selection were conceded to be well founded in law. Nor could any right, priority or other advantage accrue to him by virtue of that application in case the Railway Company's selection was afterwards cancelled—an application sub-

mitted under such conditions is a mere nullity, and nothing can be built upon it.

The latest declaration by this court of the rule here invoked is found in McMichael v. Murphy, 197 U. S. 304, and Holt v. Murphy, 207 U. S. 407, both of which cases involved the same land. The facts in those cases were these: On April 23, 1889, one White was permitted to make homestead entry of the land. Subsequently, two other parties attempted to enter the land, and on July 16, 1889, in a contest before the local land officers, it was held that all three claimants were disqualified because of their violation of the proclamation opening the tract to settlement, and that White's entry should be cancelled. An appeal was taken to the Commissioner of the General Land Office, who, on March 7, 1890, affirmed the ruling of the local officers and held White's entry for cancellation. White appealed to the Secretary of the Interior, who, on July 21, 1891, affirmed the decision of the Commissioner. McMichael settled on the land on June 3, 1889; and on July 21, 1889, he made application to enter it under the homestead law, but his application was rejected for conflict with White's entry. This was after the decision of the local officers holding White's entry for cancellation, but prior to the decision of the Commissioner on appeal. Again on August 31, 1889, McMichael made application to enter the land, and this second application was received, but "suspended" to await the result of the contest between White and the other claimants. On March 11, 1890, after the de-

cision of the Commissioner cancelling White's entry, and before the appeal to the Secretary from that decision was taken, although within the time allowed by law for such appeal, Holt filed a soldier's declaratory statement for the land, which was "suspended" by the Register and Receiver pending final action on White's appeal. Afterwards, on November 29, 1890, while the appeal was pending and before decision thereon, White filed a relinquishment of his entry, and Murphy immediately made a homestead entry on the land. After considerable litigation before the Department, Murphy was awarded the patent. McMichael brought suit in equity to have Murphy adjudged trustee of the patent title for his benefit; but a decision in favor of Murphy was affirmed by this court in McMichael v. Murphy, supra, and a similar suit brought by Holt was disposed of in Murphy's favor in Holt v. Murphy, supra.

It will be observed that White's entry was cancelled for an infirmity existing at the time the entry was made, viz.: disqualification on White's part to make the entry, and that it had been held for cancellation by the local officers before McMichael's application was filed, and by the Commissioner before Holt tendered his declaratory statement. Moreover, Holt's statement was not rejected by the local officers, but was "suspended pending final action on the appeal"; so that if the filing of an application under such conditions could give any right or priority to the applicant, Holt's claim would have been protected as against the subse-

quent entry by Murphy. The same thing is true of McMichael's second application. Nevertheless, it was held that neither McMichael nor Holt acquired any rights under their applications.

In the opinion in the McMichael case, Mr. Justice Harlan says (page 311):

> "While the entry remained uncancelled of record, by any direct action of the land office or by relinquishment, could another person, by making an entry, acquire a right in the land upon which a patent could be based? If not, then McMichael acquired no right by his entry or application to enter. * * * McMichael's entry having been made at a time when White's entry remained uncancelled, or not relinquished, of record, conferred no right upon him for the reason that White's entry, so long as it remained undisturbed of record, had the effect to segregate the lands from the public domain and make them not subject to entry. On White's relinquishment, they again became public lands subject to the entry made by Murphy. In addition it may be observed that the action of the Land Department under the statutes relating to the public lands has been in line with the above views. This appears from the decision in Hodges v. Colcord, and from the opinion of the Secretary of the Interior in McMichael v. Murphy, 20 L. D. 147. It is our duty not to overrule the construction of a statute upon which the Land Department has uniformly proceeded in its administration of the public lands, except for cogent reasons."

In the opinion in the Holt case, Mr. Justice Brewer says (page 412):

> "The Supreme Court, however, rested its decision largely upon this rule of law: That whenever an entry has been made of a tract of land, that tract is segregated from the mass of public land subject to entry until the exist-

ing entry is disposed of. Counsel for appellant do not question the general rule as to the effect of an entry regular upon its face, and concede that it is no longer open to doubt in view of the many rulings of the Land Department and the decisions of this Court. Hodges v. Colcord, 193 U. S. 192, McMichael v. Murphy, 197 U. S. 304, the latter involving the land in controversy. But they seek to distinguish this case in that the local land officers had held all the claimants disqualified, and that on appeal the Commissioner of the General Land Office, on March 7, 1890, had affirmed their ruling * * * and held the entry of White for cancellation; that the application of Holt to enter was made on March 11, 1890, before any appeal had been in fact taken from the decision of the Commissioner to the Secretary of the Interior—in other words, at the time that Holt applied to make his entry there was no pending entry. It could not have been foretold whether White would appeal from the decision of the Commissioner of the General Land Office, and if he did not there would be no entry to conflict with Holt's application. They contend that the application of Holt should have been recognized as an application to enter the land to take effect if White should not appeal from the decision of the Commissioner, or if on appeal that decision should be sustained. In that way Holt would have been given priority over all subsequent entries."

The learned Justice then considers, discusses and quotes from a number of the Land Department decisions, concluding with the following quotation from Stewart v. Peterson, 28 L. D. 515:

"That this important matter of regulation may be perfectly clear, it is directed that no application will be received nor any rights recognized as initiated by the tender of an application for a tract embraced in an entry of rec

> ord, until said entry has been cancelled upon the records of the local office."

And he says further:

> "Hence, by this rule, which was in force at the time the patent was issued, the appellant took no rights, preferential or otherwise, by the declaratory statement filed in March, 1890. Such a rule, when established in the Land Department, will not be overthrown or ignored by the courts, unless they are clearly convinced that it is wrong. So far from this being true of this rule, we are of opinion that to enforce it will tend to prevent confusion and conflict of claims."

Hodges v. Colcord, 193 U. S. 192, cited by this court in the McMichael and Holt cases as authority for those decisions, was another Oklahoma case of the same general character as the McMichael and Holt cases, where the same conclusion was reached; although that case did not present some of the special circumstances of the later cases.

Other decisions illustrating and applying different phases of the same general principles are:

Hastings & Dakota Railroad Co. v. Whitney, 132 U. S. 357.

Sturr v. Beck, 133 U. S. 541, 548.

Whitney v. Taylor, 158 U. S. 85, 93.

Kansas Pacific Railroad Co. v. Dunmeyer, 113 U. S. 629, 644.

Witherspoon v. Duncan, 4 Wall. 210, 218.

Neff v. United States, (C. C. A. 8th Cir.) 165 Fed. 273, 281.

James v. Germania Iron Co., (C. C. A. 8th Cir.) 107 Fed. 597.

In the three Oklahoma cases the invalidity of the entry consisted of the disqualification of the entryman, and did not appear on the face of the record of such entry; and some emphasis is put, in the opinions, on the fact that the entry was "prima facie valid." But in Hodges v. Colcord the court refers with express approval to the language of Mr. Justice Lamar in Hastings & Dakota Railroad Co. v. Whitney, 132 U. S. 357, where he said:

> "Under the homestead law three things are needed to be done in order to constitute an entry on public land: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered. If either one of these integral parts of an entry is defective, that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards cancelled on account of these defects by the Commissioner or on appeal by the Secretary of the Interior. * * * *But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain.*"

This language also received explicit approval in Sturr v. Beck, 133 U. S. 541, 549.

Now defects of the character defined in the foregoing quotation are such as appear upon the face of the record of the entry, and in such cases the validity or invalidity of the entry may be determined without reference to matters dehors the record. Nevertheless, in those cases, as well as in cases where the infirmity in the entry depends upon parol testimony and does not appear upon the record itself, it is held that where the entry has been accepted and allowed by the local land officers it effects a segregation of the land, and precludes the inception of any other rights thereto so long as such entry remains uncancelled.

Most of the cases cited above deal with homestead or pre-emption entries. But the rule is precisely the same in the case of a railroad indemnity selection or a selection under any of the lieu selection acts. This is well settled by the rules and decisions of the Land Department.

In the case of Southern Pacific Railroad Co., 32 L. D. 51, 53, (an opinion which appears to have been prepared by Mr. Justice Van Devanter, then Assistant Attorney General) it was said:

> "A railroad indemnity selection, presented in accordance with departmental regulations and accepted or recognized by the local officers, *has been uniformly recognized by the Land Department as having the same segregative effect as a homestead or other entry made under the general land laws.*"

The foregoing language is quoted with approval in Santa Fe Pacific Railroad Co., 33 L. D. 161, 162, where it is further said:

> "A pending selection list is therefore given *the same force in segregation of the land as an actual entry*, and lands so conditioned are within the rule fixed by circular of July 14, 1899, 29 L. D. 29."

The circular last above referred to contains the language which, in Holt v. Murphy, supra, Mr. Justice Brewer quoted approvingly from Stewart v. Peterson, 28 L. D. 515.

In Santa Fe Pacific Railroad Co. v. Northern Pacific Railway Co., 37 L. D. 593, 596, the question was whether certain unapproved indemnity selections by the Northern Pacific Company segregated the land as against certain lieu selections proffered by the Santa Fe Pacific Company, and the Secretary said:

> "This contention may be disposed of by reference to the instructions contained in the circular of July 14, 1899, 29 L. D. 29, which are to the effect that no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record until such entry has been cancelled upon the records of the local land office. The term 'entry' as used in this circular has been construed uniformly to include any claim under the public land laws, which operates to segregate the land applied for from the public domain. The rule was promulgated in the interest of good administration, and it has been uniformly followed since its promulgation. Inasmuch as the record shows that the selections of the Northern

Pacific Railway Company had not been cancelled at the time of the applications submitted by the Santa Fe Pacific Railway Company, it follows that the latter selections were properly rejected."

The reason for the rule is thus stated in a later case, carrying the same title and involving the same sort of controversy as the case last cited (Santa Fe Pacific Railroad Co. v. Northern Pacific Railway Co., 37 L. D. 669, 671):

"Numerous laws have been passed by Congress from time to time providing for the disposal of the public lands, under some of which the lands may be purchased outright and the certificate of patent received immediately upon payment. Under other laws certain preliminary action is required, to be followed by intermediate action and perhaps later by final action on the part of the applicant and the various officers of the land department before the right to receive a patent becomes vested. The orderly administration of such divers laws has rendered it absolutely necessary for the land department, whose duty it is to administer such laws, to prepare rules and regulations governing applicants in their proceedings to acquire title and also governing the subordinate branches of the Department in carrying the laws into effect. Considerable difficulty having been experienced in disposing of conflicting claims presented for the same tract of land before the Department could finally dispose of other claims of record, rendered it necessary to issue a postive definite rule respecting this matter. The rule now in force and the one obtaining at the time the applications in question were presented is contained in 29 L. D., at page 29, and provides that no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record

> until such entry has been cancelled upon the records of the local office. *The term 'entry' as used in these regulations has been uniformly held to include also my bona fide selection or application to locate.*"

The rule was applied to a conflict between a railroad indemnity selection and an application under the timber and stone act (which is precisely the sort of conflict involved in the case at bar) in Eaton v. Northern Pacific Railway Co., 33 L. D. 426, where it is said:

> "What was the status of Eaton's claim to this land on January 1, 1898? He had not at that time initiated a claim by settlement, entry, or purchase. He had, as before shown, on October 26, 1895, applied to purchase the land under the timber and stone act, which application had been rejected for conflict with the pending indemnity selection by the railroad company. * * * *So long as the railroad indemnity selection remained intact, the land embraced therein was not subject to entry or purchase under the timber and stone act, and no right or claim could be initiated by an application for such entry or purchase.* * * * It is true that during the pendency of his appeal the railroad selection was canceled under a decision of this Department since held by the Supreme Court to have been erroneous, but this cancellation was not in any way attributable to his appeal, and it has been repeatedly held that an appeal from the action of the local officers properly rejecting an application because the land described therein is not at the time subject to entry, confers no right upon the applicant, even though the land becomes subject to entry during the pendency of the appeal."

No rule of departmental procedure is more firmly established than this. And it is not of recent origin. We cite below a few of the numerous cases, in addition to those already referred to, in which the rule has been recognized and applied. Many of these cases were decided while Mr. Justice Van Devanter was Assistant Attorney General, and the opinions appear to have been prepared or approved by him. In every case it was expressly declared that while a selection allowed by the local officers, whether valid or invalid, remains uncancelled of record, it segregates the land against other claims and prevents other rights from attaching thereto.

Some of the cases cited below involve railroad indemnity selections, some state school land indemnity selections, some state selections under general grants, and some lieu selections under the Act of June 4, 1897. But it is probably unnecessary for us to point out the precise similarity, so far as concerns the application of this rule, between these various classes of selections—we think the most astute mind could find no basis for distinction between them in this respect.

Railroad indemnity selection:

Gallup v. Welch, 25 L. D. 3.

Hanson v. Roneson, 27 L. D. 382.

Northern Pacific Railway Co. v. Wolfe, 28 L. D. 298.

Olson v. Hagemann, 29 L. D. 125.

School indemnity selection:

Southern Pacific Railroad Co. v. State of California, 4 L. D. 437.

Southern Pacific Railroad Co. v. Cline, 10 L. D. 31.

George Schimmelpfenny, 15 L. D. 549.

St. Paul & Sioux City Railroad Co. v. State of Minnesota, 24 L. D. 364.

F. C. Finkle, 33 L. D. 233.

California and Oregon Land Co., 33 L. D. 595.

Santa Fe Pacific Railroad Co. v. State of California, 34 L. D. 12.

Santa Fe Pacific Railroad Co., 34 L. D. 119.

Lieu selection under act of June 4, 1897:

Porter v. Landrum, 31 L. D. 352.

O'Shee v. Coach, 33 L. D. 295.

Heirs of George Liebes, 33 L. D. 460.

State selection under quantity grant:

State of Minnesota v. Leng, 25 L. D. 432.

State swamp land selection:

Thomas v. Spence, 12 L. D. 639.

Aside from the authority of these decisions, which are in themselves controlling, there can be no logical distinction between an entry under the pre-emption or homestead law and a selection duly accepted and approved by the local officers. The term "entry" has been frequently defined, and in various ways, but it has never been held to comprehend anything more than a proper application, accompanied by affidavit when required, payment of the prescribed fees, and allowance by the local officers. It does not involve settlement upon the land itself, nor any recognition by the government

beyond the action of the local officers. And a railroad indemnity selection, before approval by the Secretary, has every characteristic of an entry thus defined. It comprehends an application to select the lands, verified by affidavit and submitted according to the regulations of the Department, payment of the prescribed fees, and acceptance and allowance by the local officers. These elements are all present in the case at bar.

Hastings & Dakota Railroad Co. v. Whitney, supra.

Chotard v. Pope, 12 Wheat. 586.

Lockwitz v. Larson, 16 Utah, 275, 52 Pac. 279.

We have said that the settled rule of the Department to this effect should be taken as controlling. This is so under the familiar doctrine that the construction given by the Department to a statute which it is charged with the duty of executing, and its rulings upon questions of practice and procedure in matters under its supervision, are entitled to great respect, and ought not to be disturbed except for the most cogent reasons, and that where that construction is long established and has been uniformly and consistently followed, it should be deemed conclusive upon the courts—unless in a case where error is most plainly manifest.

Holt v. Murphy, supra.

McMichael v. Murphy, supra.

Hastings, etc., Railroad Co. v. Whitney, supra.

United States v. Moore, 95 U. S. 760.

United States v. Burlington, etc., Railroad Co., 98 U. S. 334, 341.

Heath v. Wallace, 138 U. S. 573, 582.
United States v. Alabama, etc., Railroad Co., 142 U. S. 615, 621.
Orchard v. Alexander, 157 U. S. 383.
Hewitt v. Schultz, 180 U. S. 139, 156, 163.
Louisiana v. Garfield, 211 U. S. 70.

Again, the rule that an ordinary entry effects a segregation of the land is entirely built up upon departmental regulations and decisions—it is not based upon statute, nor, in the first instance, upon decisions of the courts. So, too, the rule that a railroad indemnity selection, allowed by the local officers, has the same segregative effect as a homestead entry, is likewise an outgrowth of departmental rules and decisions. Both rules have the same source, depend upon the same principles, and have the same practical justification. One finds as much support in reason, practical justice, and convenience of administration, as the other. Both give the same effect to substantially similar acts. If one can be sustained, as the rule with respect to an entry has been sustained by this court, it is not possible to draw a distinction against the rule which gives like effect to a selection.

This question as to the segregative effect of the Railway Company's selection was not involved in Sjoli v. Dreschel, 199 U. S. 564; and that case is not authority in the present case.

In that case Sjoli, a homestead claimant, settled on the land in 1884, and resided thereon continuously until patent was issued to him in 1901. The Railway Company made no attempt to select the

land until 1885, a year or more after Sjoli's settlement. The Department at first rejected Sjoli's application, but subsequently decided in his favor, canceled and disallowed the Railway Company's selection, and awarded the land to Sjoli, and patent was accordingly issued to him. Therefore, at the time Sjoli initiated his settlement the land was a part of the unappropriated public domain, open to his entry, and at the time his entry was finally allowed by the Department the Railway Company's selection was canceled of record.

Nor is there anything in the opinion in Sjoli v. Dreschel which touches the question of segregation. It may be true that the broad language of the opinion, read without reference to the facts there before the court, states a proposition inconsistent with the idea that an indemnity selection has any segregative effect prior to the approval thereof by the Secretary of the Interior. But we have shown that the facts of that case did not present the question at all. And there is nothing whatever in the opinion to indicate that the question of the segregative effect of such a selection was in the mind of the court or was considered or discussed in any way.

Now it is hardly to be supposed that this court, by its decision in a case where the question was not presented directly or indirectly, and where the matter was not referred to or considered in the opinion, would intentionally overturn a rule so firmly established by a long and uniform course of decision by the Land Department, and so well sanctioned by recent decisions of this court in cases in-

volving an identical principle. (Hodges v. Colcord, McMichael v. Murphy and Holt v. Murphy, supra.)

In Mr. Bunn's brief he suggests that it is unnecessary for defendants to claim a segregative effect for these selections; that it is enough to say that even though it were permissible to receive other applications and entries notwithstanding the pendency of such selection, such subsequent claims are subject and subordinate thereto, and that if the selection is valid and proper when made and is afterwards approved by the Secretary, the approval relates back to the original selection and cuts off such intervening claims.

This is, of course, perfectly true. If the approval of the Secretary relates back to the date of selection, and if the selection itself was regular and valid when made, then it is quite immaterial whether the allowance of such selection by the local officers effected a segregation of the land, regardless of possible invalidity of the selection, so as to prevent the initiation of any right to the land by a subsequent application or entry while the selection stood intact of record. And it is perfectly proper for counsel to argue his case upon that theory, if so advised—perhaps that is the theory which is most appropriate in the discussion of the Hoyt case, where an entry under the timber and stone act was allowed and approved, and payment accepted (although conditionally), at a time when the Railway Company's selection stood canceled upon the rec-

ords of the land office under a decision of the Department afterwards held by this court to be erroneous.

But Mr. Bunn's concession, made (as we must believe) only for the purpose of argument, and to give greater emphasis to the proposition that the approval of such a selection relates back and cuts off intervening claims, is so worded as to leave room for possible misunderstanding. For if what is said in that connection could be construed as a statement or admission that this court has ever held or declared that a railroad indemnity selection, valid upon its face and allowed by the local officers, does not segregate the land against the initiation of subsequent claims while such selection remains uncanceled of record (except as the language of the opinion in Sjoli v. Deschel may be given that construction), then it is manifestly misleading.

We have carefully re-examined, with this concession in mind, every case cited in Mr. Bunn's brief or in the opinion in Sjoli v. Dreschel; and in none of those cases, nor in any other case in the books, so far as we have read, have we found anything, in dictum or decision, which is in any respect contrary to or inconsistent with the Land Department rule set forth above, or inconsistent with the application to that rule of the principles declared by this court in Hodges v. Colcord, McMichael v. Murphy and Holt v. Murphy, or which furnishes any ground for a distinction between the form of entry considered in those cases and railroad indemnity selections allowed by the local officers.

And we respectfully submit that if there is anything in Sjoli v. Dreschel which may fairly be said to declare a different doctrine, it stands alone and unsupported; and that, for the reasons we have already set forth, it ought not to be regarded as authoritative.

But complainant may argue that by the action of the Commissioner of the General Land Office in 1897, based upon the erroneous ruling of the Secretary that Duluth was the eastern terminus of the Northern Pacific Railroad, the Railway Company's selection was, in effect, canceled; and hence that the segregative effect of the prior selection was destroyed or suspended during the time which intervened between such action and reinstatement of the selection; and consequently at the time when complainant "renewed" his application in December, 1897.

Now, it may well be doubted whether an erroneous cancellation, made in the manner stated, of a selection valid in fact and properly allowed by the local officers, would be effective for any purpose. But in order to simplify the issue, we may concede, for the purpose of the argument, that this action of the Commissioner amounted to a cancellation of the selection, and that thenceforth, until reinstatement, the selection had no segregative effect; so that if complainant's original application had been filed during that period, the defense that the land was segregated as against such an entry, regardless of

the validity of the selection, would not be available to defendants.

The record leaves some uncertainty as to the precise time when this cancellation was effected, but it seems quite plain that it was done pursuant to the Commissioner's order of July 17, 1897, and that it was therefore subsequent to that date. (Record, pp. 15-16.) However, it could not have been earlier than January, 1897, in any possible view; and it is quite immaterial whether the cancellation was made in January or July of that year.

Complainant's original application was filed October 26, 1895. The allegations of his bill with respect to the presentation of this application are quite full, and most of them are admitted in the answer or are established by proof. But the allegations of the bill with respect to his action in December, 1897, are very meager, and none of such allegations are admitted in the answer, nor is there a scintilla of evidence to support them.

The bill alleges that on December 28, 1897, complainant "did again renew his application to purchase said land, and again the local officers refused to allow" the application, but "received and filed" the same and "forwarded the same to the Commissioner of the General Land Office." A copy of the paper is annexed to the bill, and there are some allegations as to its *contents*. (Record, pp. 4-5, 28-30.)

The bill contains no allegation, in substance or effect, that in December, 1897, complainant possessed the requisite qualifications, or that he paid

or offered to pay the fees required by law to be paid upon such an application. As stated, there is no proof whatsoever upon the subject of this "renewal" of the application; and as the answer contains no admission on the subject, it was incumbent upon complainant to make proper proof. Moreover, complainant did not appeal from the action of the local officers on his 1897 application, and no notice was taken of it in any of the subsequent proceedings in the General Land Office or before the Secretary.

In short, it is perfectly plain that complainant abandoned his 1897 application, and elected to rely upon his original application of October, 1895. Complainant has evidently sought to maintain the integrity of his original application and to rest his case on that, taking what advantage he could from the allegation that this application was "renewed" in December, 1897. But an examination of his pleading and the attached exhibits (Record, pp. 4-5, 28-30) makes it apparent that the proceeding in December, 1897, was either a new application, or it was nothing at all; and that if complainant ever acquired any rights thereunder they have long since been abandoned and lost. Complainant having elected to stand on the first application; having acquiesced, without appeal, in the rejection of the 1897 application by the local officers; and having abandoned the later proceeding so far as his proofs in this case are concerned; cannot now claim any advantage thereunder, even if the allegations of his bill were such as to present the matter fairly.

We have not referred particularly in this connection, to the "renewal" application made in November, 1896, since that was long before the cancellation of the selections was ordered, and is therefore immaterial to the question immediately under consideration. But the showing with respect to the November, 1896, attempt is practically the same as that with respect to the attempt in December, 1897.

In the Wass case the railroad selections were allowed by the local officers and were never canceled, and Wass's claim was initiated years after the final corrected list of selections was duly filed and allowed. So there is no possible way for Wass, in his case, to avoid the question whether such a selection segregates the land against claims subsequently initiated. And the question must be disposed of in that case, whatever view the court may take in the Campbell case of the effect of the "renewal" of Campbell's application after the erroneout cancellation of the railroad selections.

III.

THE VERY TERMS OF THE TIMBER AND STONE ACT ITSELF PRECLUDE THE IDEA THAT LAND SUBJECT TO A PENDING RAILROAD INDEMNITY SELECTION IS OPEN TO ENTRY OR PURCHASE UNDER THAT ACT.

But if we lay on one side the question whether a railroad indemnity selection segregates the land as against subsequent claims, or if we assume that that question is put out of the case by the so-called "renewal" of Campbell's application after the erroneous cancellation of the indemnity selections and before reinstatement thereof, there is still another sufficient reason why complainant's application to purchase was rightly rejected by the officers of the Land Department. And aside from all other questions in the case, this point alone is enough to bar his present suit.

Section 1 of the Timber and Stone Act (Act of June 3, 1878, Chap. 151, 20 Stat. L., 89, as amended by act August 4, 1892, Chap. 372, Section 2, 27 Stat. L. 348) runs as follows:

> "That surveyed public lands of the United States within the public land states, not included within military, Indian or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States * * * at the minimum price of $2.50 per acre; and lands chiefly valuable for stone may be sold on the same terms as timber lands: *Provided that nothing herein contained shall defeat or impair any bona fide claim un-*

> *der any law of the United States*, or authorize the sale of any mining claim, or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper or coal, or lands selected by the said states under any law of the United States donating lands for internal improvements, education, or other purposes. * * *"

As originally adopted the act applied only to the states of California, Oregon and Nevada and Washington Territory. By the amendment of August 4, 1892, it was made to apply to all public land states. Therefore, as to Minnesota, in which the lands involved in the Campbell, Hoyt and Wass cases are situated, the act speaks as of the date of that amendment, viz. August 4, 1892. And the selections in controversy in these three cases were all made and perfected prior to that date. So whether the clause in the act which provides that "nothing herein contained shall defeat or impair any bona fide claim under any law of the United States" be construed to refer to claims existing at the time the statute was adopted, or (and this seems the more reasonable construction) to claims existing at the time the application to purchase the land under the act is made, this clause unquestionably applies to the selections here involved.

It should not require argument or the citation of authorities to demonstrate that, by the very terms of the statute itself, land which is subject to an existing bona fide claim in the nature of a railroad indemnity selection, which has not been abandoned but which is still pending before the Department

and pressed by the Railway Company, is not subject to entry or purchase under the act. It matters not whether such selection is valid in law, or whether it has been approved by the Secretary of the Interior. It is enough that rights under the selection are asserted in good faith by the Railway Company—since that is enough to constitute a "bona fide claim" within the meaning of the act.

It would be hard to find language of broader import than that of the clause quoted above. *"Any bona fide claim under any law of the United States"* —what terms could be used which would include more than this? The word "claim" has the widest possible significance; and surely the words "any claim under any law of the United States" are comprehensive enough to include a railroad indemnity selection in good standing. And as no question has ever been raised as to the good faith of the Railway Company in connection with these selections, they are clearly *"bona fide* claims" within the meaning of the act. As to the scope of the word "claim," when used in legislation of this character, see:

Newhall v. Sanger, 92 U. S. 761, 765.

Southern Pacific Railroad Co. v. United States, 38 Fed. 55.

Burlington & Missouri River Railroad Co. v. Abink, 14 Neb. 95, 15 N. W. 317.

United States v. Spaulding, 3 Dak. 85, 13 N. W. 357, 360.

The rule is too well established by the decisions of this court to require citation of particular cases

in support of the statement that where the language of the statute is such as to except from the operation of the granting act land which is subject to an existing *claim*, the mere pendency of the claim on the records of the land office (the same not having been abandoned, canceled or finally adjudicated upon, is enough to exclude that land from the act, without regard to whether the claim is really valid in law, and without regard to whether the same is afterwards abandoned or rejected, or is prosecuted to patent.

We think the only fair construction of the statute is that land subject to such a claim is not open to entry or purchase under the act while that claim stands. This being so, no right to the land in controversy could be acquired under complainant's application to purchase the same under the timber and stone act, whether that application was rejected by the local land officers or was accepted and allowed by them. And if the land was not open to such entry and purchase, then the complainant was not prejudiced by the denial of his application, and it is no concern of his whether the officers of the Land Department erred in awarding the patent to the Railway Company. The complainant must prevail on the strength of his own title or not at all.

This proposition is peculiarly applicable to the facts in the Hoyt case. In that case the Register and Receiver, pursuant to instructions from the General Land Office, accepted proof and payment

under the provisions of the timber and stone act from Hoyt's grantor, and issued to him the usual final receipt; but across the face of the receipt was written a memorandum to the effect that it was issued "*subject to any claim* the Northern Pacific Railroad Company may have to the lands herein described." Therefore acceptance of this receipt involved an express recognition, on the part of Hoyt's grantor as well as the Register and Receiver, of the Railway Company's claim; so that Hoyt can claim no advantage from such acceptance of his proofs and payment, as against the objection based upon the language of the timber and stone act.

It is very plain that whatever effect may be given the language of the opinion in Sjoli v. Dreschel in its application to a conflict between a railroad indemnity selection and the claim of a homestead settler (such as is presented in the Wass case) it can have no possible bearing on the facts of the Hoyt and Campbell cases, which involve applications to purchase under the timber and stone act. We have shown that by the very terms of the act itself lands subject to an existing bona fide claim are excluded from the operation of the act and from entry and purchase thereunder. And we have shown that, whatever else may be said of it and its effect, a pending railroad indemnity selection is at least a "claim" within the meaning of that act. Now all that is said in the opinion in Sjoli v.

Dreschel to the effect that such a selection does not, until approved by the Secretary of the Interior, bar other claims to the land, has reference only to claims based upon *"settlement and occupancy under the pre-emption and homestead laws"*; and considerable pains seem to have been taken to confine the expressions in the opinion to claims of that particular character and to leave no room for a construction which would extend those expressions to claims of another sort.

IV.

WHEN THE RAILWAY COMPANY'S SELECTION WAS FINALLY APPROVED BY THE SECRETARY OF THE INTERIOR, AND PATENT ISSUED TO IT FOR THE LAND, THE APPROVAL AND PATENT RELATED BACK TO THE DATE OF THE ORIGINAL SELECTION, AND CUT OFF ALL INTERVENING CLAIMS.

This proposition is the overshadowing issue in the Hoyt and Wass cases, and is very thoroughly discussed in Mr. Bunn's brief. We do not propose to go over the whole question, but only to present our views on a few of the phases which it takes. And we shall deal with it as a proposition independent of the rule that a selection allowed by the local officers segregates the land against other entries, whether the selection be valid or not—assuming, for the purposes of this branch of the discussion, that in order to defeat the complainant's claim it must appear that the selection was in all respects regular and valid, and entitled the Railway Company to the land selected, and that such selection was followed by approval and patent.

We submit that there would be no room for argument upon this proposition if it were not for certain language found in the opinion of this court in Sjoli v. Dreschel, 199 U. S. 564. And it is not what is *decided* in that case, but what is *said* in the opinion, that is responsible for the doubt which has arisen. In this connection it seems to us that the language of Mr. Justice Harlan (who delivered the opinion in Sjoli v. Dreschel) in the recent case of

Kuhn v. Fairmont Coal Co., 215 U. S. 349, is especially pertinent. The learned Justice said:

> "It has been suggested—and the suggestion cannot be passed without notice—that the views we have expressed herein are not in harmony with some recent utterances of this court, and we are referred to East Central Eureka Min. Co. v. Central Eureka Min. Co., 204 U. S. 266, 272. That case involved, among other questions, the meaning of a deed for mining property. This court, in its opinion, referred to a decision of the state court as to the real object of the deed, and expressed its concurrence with the views of that court. That was quite sufficient to dispose of the case. But in the opinion it was further said: 'The construction and effect of a conveyance between private parties is a matter as to which we follow the court of the state'—Citing Brine v. Hartford F. Ins. Co., 96 U. S. 627, 636; De Vaughn v. Hutchinson, 165 U. S. 566. *Even if the broad language just quoted seems to give some support to the contention of the defendant, it is to be observed that no reference is made in the opinion to the numerous cases,* some of which are above cited, holding that the Federal court is not bound, in cases between citizens of different states, to follow the state decision, if it was rendered after the date of the transaction out of which the rights of the parties arose. *Certainly there was no purpose on the part of the court to overrule or to modify the doctrine of those cases; and the broad language quoted from East Central Eureka Min. Co. v. Central Eureka Min. Co. must therefore be interpreted in the light of the particular cases cited to support the view which that language imports.*"

Let us apply to the interpretation of the opinion in Sjoli v. Dreschel the principles invoked by the court in the foregoing quotation. We may con-

cede that the "broad language" of that opinion supports the contention of complainant in this case, and the decision of the court in the Hoyt and Wass cases, to the effect that the Railway Company's selection, although regular and valid in and of itself, did not bar an entry of the land under the timber and stone act, where application for such entry was made prior to approval of the selection by the Secretary of the Interior. But we submit that under the principles applied in Kuhn v. Fairmont Coal Co. this broad language must be interpreted "in the light of the particular cases cited to support" the decision in Sjoli v. Dreschel, and in the light of the fact that no reference is made in that opinion to the numerous cases holding a contrary doctrine.

Now the case before the court in Sjoli v. Dreschel was that of a homestead claimant who had settled on the land in 1884, prior to any selection or attempted selection thereof by the Railway Company, and who continued to reside thereon, complying with all the requirements of the homestead law, at all times after the date of such settlement. The Railway Company filed its selection list in 1885. After prolonged litigation in the Department the railroad selection was disapproved by the Secretary and patent was issued to Sjoli, the homestead claimant. But the land was included in a withdrawal made by the Secretary some time previous to Sjoli's settlement thereon, in aid of the Railway Company's indemnity rights; and one of the questions in the case was whether that withdrawal, made in advance of selection, prevented the attaching of rights under Sjoli's settlement.

The particular cases cited in Sjoli v. Dreschel fully sustain the point actually decided; but we respectfully submit that not one of them furnishes support for the broad language of the opinion; at least in the application given that language by the Court of Appeals in the Hoyt case and by the Supreme Court of Minnesota in the Wass case.

Hewitt v. Schultz, 180 U. S. 139, Cedar Rapids & Missouri River Railway Co. v. Herring, 110 U. S. 27, Northern Pacific v. Miller, 7 L. D. 100 and Northern Pacific v. Davis, 19 L. D. 87, were all cases involving railroad indemnity selections, where the settlement antedated the selection.

Nelson v. Northern Pacific, 188 U. S. 108, Spicer v. Northern Pacific, 10 L. D. 440, Northern Pacific v. McCrimmon, 12 L. D. 554, and Northern Pacific v. Plumb, 16 L. D. 80, were cases involving land within the place limits of the Northern Pacific grant where settlement was made before definite location of the railroad, and the question was as to the effect of a withdrawal before settlement.

Northern Pacific v. Sanders, 166 U. S. 620, involved lands in the place limits, also, and the question was whether mineral claims, of record at the time of definate location, although afterwards cancelled, operated to except the land from the grant

Menotti v. Dillon, 167 U. S. 703, was another case involving place lands, where the conflict was with a claimant whose rights were initiated before definite location.

United States v. Northern Pacific, 152 U. S. 284, United States v. Oregon & California Railroad, 176

U. S. 28, St. Paul & Pacific v. Northern Pacific, 139 U. S. 1, St. Paul & Sioux City Railroad v. Winona & St. Peter Railroad, 112 U. S. 720, Kansas Pacific v. Atchison, Topeka & Santa Fe, 112 U. S. 414, and Missouri, Kansas & Texas Railway Co. v. Kansas Pacific Railway Co., 97 U. S. 491, are cases involving conflicting railroad grants, in none of which were the rights of individual entrymen considered; and none of these latter cases has any direct bearing upon the particular point now under discussion.

In Grinnell v. Railroad Co., 103 U. S. 739, the decision was in favor of the railroad company, but the court suggests the query whether the claim of the railroad company to selected lands would be superior to an entry made prior to selection.

Wilcox v. Eastern Oregon Land Co., 176 U. S. 51, is another case where the decision was in favor of the railroad company, and there is nothing suggesting a doubt as to the priority of an indemnity selection made previous to adverse entry.

Resser v. Carney, 52 Minn. 397, is a case which applies the well settled principle that no *title* vests under an indemnity selection until approval by the Secretary, and no question of priority is involved.

Musser v. McRae, 38 Minn. 409, is an earlier decision in the case reported under the same title at 44 Minn. 343. The plaintiffs' holding under conveyance from the company, sued to recover for timber cut from land within the indemnity limits of a Wisconsin railroad grant; but on the first trial they made no effort to prove that the land had been selected, or the selection approved, nor did they show

any patent from the United States. The court held that the plaintiffs had failed to prove title sufficient to support an action for trespass; and the language quoted from that case in Sjoli v. Dreschel was used with reference to that omission. All this is explained in the opinion on the second appeal (Musser v. McRae, 44 Minn. 343, which is one of the authorities relied upon in support of our position. On the second trial the missing proof was supplied; and, the date of selection being established, the court held that the patent related back to the date of the filing of the selection list, so as to permit recovery for timber cut from land between the date of selection and the date of the Secretary's approval thereof.

Aside from the fact that none of the authorities cited in Sjoli v. Dreshcel support the broad language of the opinion in the application given it in the Hoyt and Wass cases, we venture the statement, which we put in italics for greater emphasis, that:

Prior to the decision in Sjoli v. Dreschel it was never held or declared by any court or in any decision of the Land Department that the rights acquired under a railroad indemnity selection, properly made, of land then subject to such selection, where that selection was subsequently approved by the Secretary of the Interior in due course, could be defeated by an entry, settlement or other claim initiated after the date of such selection, although before approval thereof.

Nor has it been so held in any case since the de-

cision of Sjoli v. Dreschel, except by the Court of Appeals in the Hoyt case, and by the Supreme Court of Minnesota in the Wass case, and in Houston v. Northern Pacific, 109 Minn. 273,—cases decided by courts which considered themselves bound by the language of the Sjoli case.

In some other cases in this and other courts the language of Sjoli v. Dreschel has been cited or quoted, but in none of these latter cases has it been applied in the sense it is here considered. For instance, Brandon v. Ard, 211 U. S. 11, is an echo of the old case of Ard v. Brandon, 156 U. S. 537, where settlement on the land antedated the inception of the railroad company's rights; and Osborn v. Froyseth, 216 U. S. 571, was a case where, as in Sjoli v. Dreschel, a homestead claimant settled on the land long prior to the first valid selection by the railway company, although in that case there had been an earlier selection adjudged invalid and canceled by the Land Department, upon which it was held no rights could be predicated.

Indeed, if the decision in Osborn v. Froyseth is carefully considered it will be found at least inferential authority for our position. If it were the law that the rights of a claimant settling on the land at any time before approval by the Secretary are superior to rights under an indemnity selection, there would have been no occasion for the discussion and consideration given that case, nor for the marked emphasis put upon the fact that the homestead claimant settled on the land prior to any valid

selection thereof. For in that opinion Mr. Justice Lurton said:

> "The plain effect of the settlement made upon the land here in controversy before any valid selection of the same land by the railroad company, under its grant, was to initiate a homestead right. That settlement and possession continued from the time it was first made, and when, in October, 1891, the Hastings and Dakota Railroad, or its successors in title, attempted to select that land as indemnity land, the land in question was in the actual occupancy of Froyseth claiming it as a homestead. It had, by such settlement, been segregated from the lands subject to selection, and in a contest between such a homesteader and those claiming under selections subsequently made of lieu lands the claim of the former is the better claim. * * * But it is urged that the original selection made May 26, 1883, was valid, and operated to vest the title as of that date in the railroad company. * * * The rejection by the Secretary of the Interior of the selection made in 1883 is fatal to any claim now made to carry back the title of the plaintiff in error to that selection. * * * Thus, if either pre-emption or homestead rights had been initiated before such selection, the parcels to which such right had attached were not subject to appropriation as indemnity lands. * * * But it is urged that the mere fact that there was no record evidence of the homestead claim when the selection of 1891 were made was enough to give efficacy to that selection and vest the legal title under the patents thereafter issued. But this is answered by what we have already said, namely, that if at that date this land was actually occupied by one qualified under the law, who had entered and settled thereon before that time, with the intent to claim it as a homestead, the land had ceased to be public land and as such subject to selection as lieu land."

This case of Osborn v. Froyseth also supplies a sufficient answer to the suggestion that the rule deduced from the broad language of the opinion in Sjoli v. Dreschel was necessary to the decision in that case, for the reason that Sjoli did not file his application to enter the land as a homestead until long subsequent to the selection thereof by the Railway Company, although his settlement thereon preceded such selection. The same conditions existed in Osborn v. Froyseth; and the court points out that "under the act of May 14, 1880, (ch. 89, 21 Stat. 141, sec. 3) the right of one settling in good faith for the purpose of claiming a homestead relates back to the date of settlement"; also that where the land is, at the time of selection, in the occupancy of an actual settler who intends in good faith to claim the land as a homestead, such occupancy removes the land from the category of land subject to indemnity selection; and an attempted selection thereof is ineffectual, without regard to whether the settler subsequently perfects his homestead claim. These propositions are fully sustained by St. Paul, Minneapolis & Manitoba Railway Co. v. Donohue, 210 U. S. 21, 31, which is cited in that connection in Osborn v. Froyseth.

But let us examine some of the numerous cases, to which no reference is made in the opinion in Sjoli v. Dreschel, which announce and apply principles directly contrary to or inconsistent with the

broad language of that opinion as interpreted by the Court in the Hoyt and Wass cases. There is no lack of authorities directly in point. The great cases of Campbell v. Doe, 13 How. 244, Shepley v. Cowan, 91 U. S. 330, and McCreery v. Haskell, 119 U. S. 327, are referred to in Mr. Bunn's brief, and we shall not dwell upon them here at any great length. But there are certain features of those cases which we shall touch upon in passing. Each of those cases declares and applies the familiar doctrine, thus stated by Mr. Justice Field in Shepley v. Cowan:

> "The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. * * * In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

This principle was applied in McCreery v. Haskell to a selection which, in its essential qualities, was precisely like the selection in the case at bar. This was a state selection under a grant to the State of California by an act which provided (10 Stats. 247, Sec. 7):

> "That where any settlement * * * shall be made upon the 16th and 36th sections before the same shall be surveyed, or where such sections may be reserved for public uses, or taken by private claims, other lands shall be selected by the proper authorities of the state in lieu thereof, agreeably to the provi-

> sions of the act of Congress approved on the 20th of May, 1826, entitled 'An Act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for,' *and which shall be subject to approval by the Secretary of the Interior* * * *."

In that case Mr. Justice Field, delivering the unanimous opinion of the court, said:

> "The land * * * was open to settlement with other public lands, and consequent preemption by settlers, and to selections by the State in lieu of the school sections within the confirmed Mexican grant. * * * As between the settler and the State, the party which first commenced the proceedings required to obtain the title, if followed up to the final act of the government for its transfer, is considered as being entitled to the property. *In such cases the rule prevails that the first in time is the first in right* * * * Where, by reason of the loss of the school sections, a selection is made of other lands, the list certified *operates upon the selection as of the day when made and reported to the local land office, and cuts off, as would a patent in such cases, all subsequent claimants.* In the present case, the selection by the authorities of the State of the land in controversy, was made on the 22nd of April, 1868, nearly one year and eight months before the alleged settlement of the plaintiff. *The subsequent approval of the selection by the Secretary of the Interior* and the listing of the land to the State by the Commissioner of the General Land Office, completed the proceedings which *vested the title in the State as of the date of the selection.*"

The cases of Shepley v. Cowan and McCreery v. Haskell have been cited, and the principle that in proceedings for the acquisition of public lands the

first in time is the first in right and that the patent when issued relates back to the initiatory step and cuts off all intervening claimants has been applied, in a vast number of decisions by state and Federal courts and by the Land Department. A few of these cases are cited below.

Sturr v. Beck, 133 U. S. 541, 550.

Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, 414.

United States v. Anderson, 194 U. S. 394, 399.

United States v. Detroit Lumber Co., 200 U. S. 321.

Wirth v. Branson, 98 U. S. 118.

Last Chance Mining Co. v. Tyler Mining Co., (C. C. A. 9th Cir.) 61 Fed. 557.

Peyton v. Desmond, (C. C. A. 8th Cir.) 129 Fed. 1, 11.

Waldron v. United States, 143 Fed. 413.

Ison v. Nelson Mining Co., 47 Fed. 199.

Lilienthal v. Southern California R'y. Co., 56 Fed. 701.

Hollowell v. Slauson, 83 Cal. 539, 23 Pac. 692.

Brigham City v. Rich, 34 Utah 130, 97 Pac. 220.

Talbot v. King, 6 Mont. 76, 9 Pac. 434.

Silver Bow Mining & Milling Co. v. Clarke, 5 Mont. 378, 5 Pac. 570.

Benton v. Johncox, 17 Wash. 277, 49 Pac. 495.

Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 522, 91 N. W. 352.

Danforth v. Morrical, 84 Ill. 456.

It seems to us that the case of United States v. Anderson, 194 U. S. 394, is absolutely conclusive of the question now under discussion. That was a

case involving a grant to the State of Alabama in aid of railroads, which provided for indemnity selections to be made by the agents of the State, subject to the approval of the Secretary of the Interior. Selections were duly made in 1887, but were rejected by the local officers under an erroneous view of the law. On appeal this action of the local officers was set aside, and in 1896 the selections were approved by the Secretary and the lands certified to the State. During the period which elapsed between the date of selection and the date of the approval by the Secretary, certain persons went upon the land and removed valuable iron ore and lime rock therefrom. The United States brought suit to recover for this trespass, and a compromise was made with the trespassers under which they paid $15,000 to the United States in settlement of the claim for the material removed from the land. Afterwards the persons succeeding to the rights of the State under the selection sued the United States in the Court of Claims and recovered judgment for $15,000. This judgment was affirmed by this court in an opinion by Mr. Justice White, who said:

> "Under these circumstances, the case is one for the application of the fiction of relation, by which, in the interest of justice, *a legal title is held to relate back to the initiatory step for the acquisition of the land.* Many cases illustrating the doctrine in various aspects have been determined in this court. (Citing authorities in foot-note.) Indeed, this case is one coming peculiarly within the principle of relation, as the approval of the selections manifestly imported that at the time of the appli-

> cation for selections the land in question was rightfully claimed by the applicant. * * * Here, as we have seen, the grantee had exercised his right to apply for selections within the indemnity limits and had in legal form requested the approval of the same by the Government. Everything, therefore, which the grantee was required by law to do to obtain the legal title had been performed. These facts bring the case within the principle decided in Heath v. Ross, 12 Johns. 140, and Musser v. McRae, 44 Minn. 343."

Musser v. McRae, 44 Minn., 343, was a case where timber was cut from the selected land by trespassers between the date of a railroad indemnity selection and the date of approval thereof; and it was held that the patent title related back to the date of selection so as to carry the right to recover for the trespass. The court said:

> "Upon the state of facts presented by the record the title acquired by the company under the patent unquestionably inured to the plaintiffs, its grantees, and their further contention is that the title derived from the government under the patent took effect by relation as of the date of the selection of the lands by the company. * * * The deficiency lands selected by the company were such as they were entitled to, and the patent is evidence of the ratification of the selection, and this selection duly certified to the department, may be treated as a lawful application for the confirmation or approval thereof. It was an assertion of their claim to the particular lands, *and, if approved, the title may properly be held to relate back at least to the date of such selection* in order to protect them against trespassers upon the lands."

Musser v. McRae was expressly approved in United States v. Anderson, supra, and was recognized as authority, although distinguished upon the particular facts of that case, in United States v. Loughrey, 172 U. S. 206; where this court said of the decision in Musser v. McRae:

> "It was held that the issuance of a patent to the Railway Company for the lands so selected was evidence that the company had complied with all the conditions of the grant, and was entitled to the lands described therein, and that the title passed from the United States *at the date of the selection*. And it was further held that * * * the patents must be held to relate back to the selection of the lands, so as to save the purchasers to whom the lands had been granted, a right of action for the timber wrongfully removed from the land."

Now it seems to us that the decisions in United States v. Anderson and Musser v. McRae are wholly inconsistent with the idea that no rights attach by virtue of a selection allowed by the local officers, as against a claim initiated after such selection, but before approval thereof by the Secretary of the Interior. If such approval, and the patent issued in consequence thereof, relate back to the date of selection so as to enable the selector to recover the value of timber taken from the land before such approval, and to recover from the Government itself money collected by it in settlement of a claim for similar trespasses, how can it be held that the approval and patent do not relate back to the date of selection and cut off claims subsequently initiated? Surely there is the stronger

reason for the application of the doctrine of relation in the latter case. Indeed, it is for the purpose of cutting off intervening claims that the doctrine is most commonly invoked.

In the leading case of Stark v. Starrs, 6 Wall. 402, Mr. Justice Field said:

> "When in fact the patent does issue, it relates back to the inception of the right of the patentee, *so far as it may be necessary to cut off intervening claimants.*"

In Smelting Co. v. Kemp, 104 U. S. 647, the same great judge said.

> "This doctrine as to the conclusiveness of a patent is not inconsistent with the right of the patentee, often recognized by this court, to show the date of the original proceeding for the acquisition of the title, where it is not stated in the instrument, as the patent is deemed to take effect by relation as of that date, *so far as it is necessary to cut off intervening adverse claims.*"

In Heydenfeldt v. Daney Gold Min. Co., 93 U. S. 634, it was said:

> "The patent subsequently obtained from the United States relates back to the time of the original location and entry, and perfects their right *to the exclusion of all adverse intervening claims.*"

Peyton v. Desmond, 129 Fed. 1, 11, was a case similar to United States v. Anderson and Musser v. McRae, except that it was a homestead settler who was there permitted to recover for timber cut from the land before his settlement claim had ripened into an equitable title. And Mr. Justice Van De-

vanter, speaking for the Court of Appeals, said:

> "While the doctrine of relation is of equitable origin, it has a well-recognized application to proceedings at law. By it 'is meant that principle by which an act done at one time is considered, by a fiction of law, to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held, for certain purposes, to take effect by relation as of the day when the first proceeding was had.' Gibson v. Chouteau, 13 Wall. 92. * * * The doctrine is also applied to public land transactions, when, to give effect to the intent of the statute *or to cut off intervening claimants*, the patent is deemed to relate back to the initiatory act. Ross v. Barland, 1 Pet. 655, 664; Landes v. Brant, 10 How. 348, 372; Lessee of French v. Spencer, 21 How. 228, 240; Beard v. Federy, 3 Wall. 478, 491; Grisar v. McDowell, 6 Wall. 363, 380; Stark v. Starr, 6 Wall. 402, 418; Lynch v. Bernal, 9 Wall. 315, 325; Shepley v. Cowan, 91 U. S. 330, 337, 340; Weeks v. Bridgman, 159 U. S. 541, 546; United States v. Loughrey, 172 U. S. 206, 218, 219, 225-231. Thus it was said in Shepley v. Cowan: 'The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right, as against others, to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, *and cuts off all intervening claimants*. Thus the patent upon a state selection takes effect as of the time when the selection is made and reported to the land office, and the patent upon a pre-emption settlement takes effect from the time of the settlement, as disclosed in the declaratory statement or proofs of the settler to the register of the local land office.' Other applications of the doctrine will be found in Cothrin v. Faber,

68 Cal. 39; Jackson v. Bull, 1 Johns. Cas. 81; Jackson v. Ramsey, 3 Cow. 75; Heath v. Ross, 12 Johns. 146; St. Onge v. Day, 11 Colo. 368; Musser v. McRae, 44 Minn. 343."

The following language from the Eureka Case, 4 Sawy. 317, is quoted with approval in Silver Bow Mining & Milling Co. v. Clark, 5 Mont. 378, 5 Pac. 570:

> "Each patent is evidence of a perfected right in the patentee to the claim conveyed, the initiatory step for the acquisition of which was the original location. * * * The patent will take effect by relation as of that date, *so far as may be necessary to cut off all intervening claimants.* * * * As, in the system established for the alienation of the public lands, the patent is the consummation of a series of acts having for their object the acquisition of the title, the general rule is to give to it an operation by relation at the date of the initiatory step, so far as may be necessary to protect the patentee against subsequent claimants to the same property."

And in this connection the language already quoted above from McCreery v. Haskell is especially pertinent.

In addition to the authorities already cited, the following cases further support the principle that the doctrine of relation will be applied for the purpose of cutting off claims attaching after the initial step in the proceedings which culminate in patent:

Irvine v. Sims, 3 Dall. 425.

Ross v. Barland, 1 Pet. 655.

Beard v. Federy, 3 Wall. 478.

Weeks v. Bridgeman, 159 U. S. 541.

Patterson v. Tatum, 3 Sawy. 164.

Pacific Coast Mining & Milling Co. v. Spargo, 16 Fed. 348.

Klein v. Argenbright, 26 Iowa, 493.

Cothrin v. Faber, 68 Cal. 39, 4 Pac. 940.

St. Onge v. Day, 11 Colo. 368, 18 Pac. 278.

Faull v. Cooke, 19 Ore. 455, 26 Pac. 662.

Lockwitz v. Larson, 16 Utah, 275, 52 Pac. 279.

Washington Rock Co. v. Young, 29 Utah, 108, 80 Pac. 382.

Page v. Crowley, 83 Minn. 314.

The basic principle which from the beginning has controlled the disposition of the public lands is that, as between conflicting claimants, the first in time is first in right, and that the patent relates back to the date of the initial step lawfully taken by the patentee, or his predecessors in interest, looking towards the acquisition of the land under the law providing for disposal of the same. This principle has been expressly declared in hundreds of cases, but few of which are cited in this brief, and in a still greater number of decisions it has been tacitly recognized and has controlled the determination of the court, although not referred to in terms. And all those cases are but applications of a fundamental rule which runs through the whole fabric of the public land law, and which controls, in some degree, the determination of practically every case where two or more parties claim

the same tract of land. There is no principle of law having relation to the disposal of the public lands and to land titles in general which is so well settled or which has had such widespread and long-continued application. And there is surely none whose reversal or modification would so complicate and disturb the administration of the public lands and the security of titles.

In the course of a somewhat extensive experience in public land questions, and after a most exhaustive search among the authorities bearing upon this particular question, we have not learned of a single case in which this principle has been denied, or which gives authority for the conclusion adopted in the Hoyt and Wass cases—except as such intent may be imputed to the language of the opinion in Sjoli v. Dreschel.

That principle has been applied to entries and claims of every character, and as to no class of claims has it been denied or disregarded. And always the date that fixes priority is held to be the date of the initial step taken under the law, whether that first step be settlement on the land, the filing of a declaratory statement or application to enter or purchase, the deposit of a land warrant or other certificate, or the filing of a selection list or application to select. And it is always the date of settlement or of the filing of the application or other paper in the local land office that fixes the right, regardless of the date when action is taken thereon by the local land officers, the Commissioner of the General Land Office, or the Secretary of the In-

terior. In no case that we have found has the attaching of the claimant's rights, as a matter of priority over other claims, been postponed to the date when action was taken on his claim or selection by the officers of the Land Department, if the initial step was lawfully taken and the land was then subject to such appropriation.

We have selected for the information of the court a few of the numerous cases illustrating the application of this principle to different classes of claims; indicating, in each case, the character of the entry and the date from which the claim was held to have priority.

Preemption entry: from date of settlement on land, where that act preceded the filing of the declaratory statement:

Johnson v. Towsley, 13 Wall. 72.

Shepley v. Cowan, 91 U. S. 330.

Lilienthal v. Southern California Ry Co., 56 Fed. 701.

Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 522, 91 N. W. 352.

Preemption entry: from date of filing the declaratory statement, where that act preceded settlement:

St. Onge v. Day, 11 Colo. 368, 18 Pac. 278.

Homestead entry: from date of settlement, where that act preceded the filing of application to enter.

Ard v. Brandon, 156 U. S. 537.

Osborn v. Froyseth, 216 U. S. 571.

Faull v. Cooke, 19 Ore. 455, 26 Pac. 662.

Homestead entry: from date of filing application to enter, where that act preceded settlement.

Sturr v. Beck, 133 U. S. 541.

Peyton v. Desmond, 129 Fed. 1.

Timber and stone entry: from date of filing application.

St. Paul, M. & M. Ry. Co. v. Donohue, 210 U. S. 21.

State selection under quantity grant: from date of filing application to select in local land office.

Ison v. Nelson Mining Co., 47 Fed. 199.

Patterson v. Tatum, 3 Sawy. 164.

Brigham City v. Rich, 34 Utah 130, 97 Pac. 220.

State selection of indemnity lands: from date of filing application to select in local land office.

McCreery v. Haskell, 119 U. S. 327.

Howell v. Slauson, 83 Cal. 539, 23 Pac. 692.

Mining claim: from the date of location.

Heydenfelt v. Daney Gold Min. Co., 93 U. S. 634.

Last Chance Min. Co. v. Tyler Min. Co., 61 Fed. 557.

Talbot v. King, 6 Mont. 76, 9 Pac. 434.

Silver Bow Mining & Milling Co. v. Clarke, 5 Mont. 378, 5 Pac. 570.

Indian allotment: from date of application for allotment or date of settlement.

Waldron v. United States, 143 Fed. 413.

Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401.

Spanish or Mexican grant: from date of filing application for confirmation.

Ross v. Barland, 1 Pet. 655.

Landes v. Brant, 10 How. 348.

Beard v. Federy, 3 Wall. 478.

Lynch v. Bernal, 9 Wall. 315.

Military bounty land warrants: from date of location by filing in local land office.

Wirth v. Branson, 98 U. S. 118.

Klein v. Argenbright, 26 Iowa, 493.

Lieu selection under the exchange provisions of the so-called "Forest Reserve Lieu Selection Act" of June 4, 1897: from date of filing application to select in local land office.

Clarke v. Northern Pacific, 30 L. D. 145.

Gideon F. McDonald, 30 L. D. 124.

Kern Oil Co. v. Clarke, 30 L. D. 550.

Lieu selection under the exchange provisions of the act of March 2, 1899, establishing the Mt. Rainier National Park: from date of filing application to select in local land office.

Ferguson v. Northern Pacific, 33 L. D. 634.

Swanson v. Northern Pacific, 37 L. D. 74.

State of Idaho v. Northern Pacific, 37 L. D. 70.

Lieu selection under act of July 1, 1898, for the adjustment of conflicting claims under the Northern Pacific grant: from date of filing application to select in local land office.

Northern Pacific v. Mann, 33 L. D. 621.

Soldier's additional homestead: from date of filing application to enter in local land office.

Oliver v. Thomas, 5 L. D. 289.

As between two railroad companies whose indemnity limits overlap "priority of selection secures priority of right," and the priority depends on the date of filing the selection list.

St. Paul & Sioux City Railroad v. Winona & St. Peter Railroad, 112 U. S. 720.

There is nothing whatever in such decisions as Wisconsin Central v. Price County, 133 U. S. 496, Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, Humbird v. Avery, 195 U. S. 480, and Oregon & California Railroad Co. v. United States, 189 U. S. 103 and 116, (and there are many cases of the same general character) which is in any respect inconsistent with the doctrine we invoke. In each of those cases it is held that approval by the Secretary of the Interior is necessary to convert a railroad indemnity selection into an estate or interest entitled to recognition *as against the United States*, or into an equitable title which can be used as a basis for proceedings in which *ownership* of the land is an essential prerequisite.

There is a clear distinction between acts necessary to establish an equitable title or vested interest in the land as against the Government, and acts necessary to secure priority over an adverse claimant under the public land laws. It may be

admitted that until approval of an indemnity selection the selector has no rights as against the United States; and that until such approval it is competent for the Government to deal with or dispose of the land as it sees fit. But this is a very different thing from saying that the act of selection, when followed up by approval, gives no rights or priority over an individual who attempts to initiate a claim to the land subsequent to such selection, but prior to the approval thereof.

Under practically every method by which public lands are acquired, and especially in the case of entries under the preemption law, the homestead law, and the timber and stone act, there is an initial step—settlement on the land, or the filing in the local land office of a declaratory statement or application to enter—which fixes priorities as between the applicant and a possible adverse claimant, but which confers no vested right as against the Government. It is settled by numerous decisions that until the preemptioner or timber and stone applicant has completed his entry by final proof and payment, and until the homesteader has earned the land by full complaince with the requirements of the homestead law, the Government may dispose of the land as it sees fit, and the claimant has no standing to complain of any such disposition.

Frisbie v. Whitney, 9 Wall. 187.

The Yosemite Valley Case, 15 Wall. 77.

Consequently the fact that an indemnity selection does not, prior to approval, create a right or interest effective against the Government, or vest in the company an estate which is subject to taxation or an equitable title which will support an action dependent upon ownership, has no bearing on the question whether such selection, if otherwise valid, has priority over a claim subsequently initiated under the homestead law or the timber and stone act. This distinction was recognized in Cosmos Exploration Co. v. Gray Eagle Oil Co., supra, where it was held that a lieu selection under the act of June 4, 1897, did not vest an equitable title in the selector until approval of such selection by the Secretary. After so declaring, Justice Peckham said:

> "It may be that when the decision of the Land Department is made, if it be favorable to the applicant, the complete equitable title claimed will accrue *from the time the selection of the lands was made in the local land office*, and when the patent subsequently issues the legal title *will rest from the time of selection*."

And in the course of the opinion in Oregon & California Railroad Co. v. United States, supra, Mr. Justice Harlan said:

> "The rule is otherwise as to lands within indemnity limits. As to lands of the latter class the Company *acquires no interest* in any specific sections until a selection is made with the approval of the Land Department; *and then its right relates to the date of the selection*."

The Supreme Court of Missouri in Hammond v. Johnston, 93 Mo. 198, 6 S. W. 83, recognized this distinction as applied to selections under the New Madrid Act, saying:

> "It is true, beyond all doubt, that as between Easton and those claiming under him on the one hand, and the United States on the other, there was no vested right in Easton and those claiming under him, as against the United States, until the surveyor returned the plat to the recorder of land titles, which was not done until 1833. *But as between Easton and third persons, he did acquire a priority* and a right which the courts respect and uphold and enforce.

In some of the arguments in this case much emphasis has been laid upon the provision in the granting act to the effect that indemnity selections shall be made "subject to the approval of the Secretary of the Interior," or "under the direction of the Secretary of the Interior"; but these provisions do not affect the question of priority. They are very material in determining whether any right is secured by the Railway Company, *as against the United States*, by the mere filing of its list of selections. But as explained above, this is something entirely distinct and different from the question of priorities as between individual claimants. Until the selection has been passed upon and approved by the Secretary, it has no standing as against the Government; but when the selection has been examined and found to be legal and valid, and the required approval has been given, that approval relates back to and takes effect from the date of the

filing of the selection list in the local office, as against claims asserted by an individual whose alleged rights have had their inception in the interim.

In passing upon such selections the Secretary acts in a judicial or quasi-judicial capacity. His discretion to approve or disapprove the selections is not arbitrary and unrestrained, but must be exercised in a reasonable and judicial manner. If the land is free from adverse claims and is such as the Company is entitled to select, if a deficiency exists for which the Company is entitled to indemity, and if the selection and the proceedings connected therewith are in all respects regular and in accordance with the law and departmental regulations, then it is the duty of the Secretary to approve such selection.

In McHenry v. Nygard, 72 Minn. 2, Judge Mitchell said:

> "Although the selection of the lieu lands was to be made under the direction of the Secretary of the Interior, they were to be selected by the railroad company, and not by the Secretary. If the company was entitled to select the land, and did so in conformity with all the requirements of law, the officers of the Land Department had no authority arbitrarily to refuse to recognize and approve the selection. The rights of the Company under its selection became fixed and vested notwithstanding such rejection and refusal."

In Jones v. Northern Pacific, 34 L. D. 105, 110, the Secretary said:

> "That the right of selection conferred by these acts cannot be restricted by the Secretary of the Interior seems clear. His duty in the premises is to supervise the administration of the grant, but this authority does not permit him to abridge or enlarge the laws of Congress. He should see that the selections made in satisfaction of the grant are confined to the lands described in the granting act, but as between different sections equally within the description contained therein, he cannot say which may or which may not be selected, for in so doing he would be denying the railroad company the right to make the selection."

In Willamette Valley and Cascade Wagon Road Co. v. Bruner, 26 L. D. 356, it was said:

> "The right of selection conferred by the granting act cannot be restricted or limited by the Secretary of the Interior. It is his duty to supervise the administration of this grant but his authority does not permit him to revise or limit the laws of Congress. He is as much bound by the provisions of the granting act as is either of the claimants in this case. It is the duty of the Secretary to see that the selections made in satisfaction of the grant are confined to lands described in the granting act. * * * * The supervisory authority of the Secretary is not unlimited and cannot be exercised arbitrarily for the purpose of conferring rights upon one person to the detriment of the acknowledged rights of others; Cornelius v. Kessel, 128 U. S. 456."

See also:

Sage v. Swenson, 65 Minn. 517.

Southern Pacific v. Wiggs, 43 Fed. 333.

St. Paul & Sioux City v. Winona & St. Peter, 112 U. S. 720.

Insofar as a distinction may be drawn between an act which provides that selections thereunder shall be "subject to the approval" of the Secretary, and one which provides that selections shall be made "under the direction" of the Secretary, the distinction is favorable to selections under a provision of the latter sort. It has been well said that a selection is made "under the direction" of the Secretary, when it is made pursuant to general regulations or instructions promulgated by him; whereas, where the statute expressly requires his "approval," an affirmative approval of the specific selections is necessary to vest title thereunder.

In Southern Pac. R. Co. v. Wiggs, 43 Fed. 333, Judge Sawyer said:

> "Although the selection of the lieu lands were to be 'made under the direction of the Secretary of the Interior,' they were to be 'selected by said company,' not by him; nor was the selection required to be approved by him as is required by some other acts. And when there was a deficiency, and the company selected lands open to selection, there was no authority vested in the Secretary to arbitrarily refuse to recognize and allow such selection. This would deprive the company of the right of selection expressly given by the statute, and vest it in the Secretary."

But the case at bar has been argued and is submitted on the theory that the same rules apply against the selection under which defendants derive title, that would apply if the act provided that selections thereunder should be made "subject to the approval" of the Secretary.

There is another matter which is entitled to the greatest possible weight in the consideration of this question; and that is the fact that from the beginning the Land Department has uniformly held that no rights can be acquired by an entry made subsequent to a valid railroad indemnity selection, although prior to the approval of such selection. Never for a moment has there been a departure from the rule that the date of actual selection (which is interpreted to mean the date the selection list is filed in the local office), regardless of the date of approval, determines the rights of the company as against adverse claimants; and the Department has steadfastly refused to recognize claims initiated after that date, where the original selection is found to be regular and valid.

Under the familiar doctrine already referred to in this brief in another connection, where the authorities are cited, this long and uniform course of decision of the Land Department should be given great respect by this Court, and should not be overruled or departed from except for the most cogent reasons, nor unless it is plain beyond doubt that the rule of law thus established is erroneous and unreasonable.

Now we respectfully submit that the rule is neither erroneous nor unreasonable; but that on the contrary it is right, in principle and upon authority, and that it ought to be sustained by this Court, on its merits and quite independently of the weight to which the decisions of the Land Department are

entitled as decisions of the department charged with the duty of executing the statutes thus construed. We submit that the rule is a rule of practical justice and is conducive to orderly administration; and that a contrary rule would create disturbance and disorder and would serve no good or useful purpose.

Such a rule is consistent with the principles which control the practice of the Department under all the various laws for the disposition of the public domain—it is a rule of necessity, without which an orderly administration would be impossible—and there is no fair reason for distinguishing a railroad indemnity selection from any form of acquisition of public land.

Every method by which public land may be acquired under the law necessarily involves, first, the act by which the claimant indicates his desire to appropriate specific land, and next, a determination by the Department that he is entitled to take that particular land. Obviously the assertion of the claim must precede the determination by the Department, and in the ordinary course of administration considerable time must often elapse before the determination can be made. In no class of cases is delay so likely to occur as in the consideration of railroad indemnity selections, where the Department must determine not only whether the land selected is such as the company is entitled to receive, but also whether the loss for which indemnity is claimed furnishes proper ground for such selection; and rarely, if ever, is the delay chargeable to

neglect or omission of the company.

It has uniformly been held, from the beginning, that a claimant who has fully complied with the law on his part cannot be prejudiced by delay in passing upon his claim, and that no claim subsequently initiated will be permitted to defeat his rights; but when his entry has been passed upon by the Department the patent issued to him relates back to the date of the first lawful assertion of his right and cuts off all intervening claims.

Now what just reason can there be for applying a different rule in the case of railroad indemnity selections? If the company is entitled to the land under its granting act, if the land is free from other claims at the time of selection, and if the selection is properly made in accordance with the regulations and practice of the Department, why should the company suffer from delay of the Department in passing upon the selection, and why should the company be deprived of its rights in favor of a speculator who seeks to enter the land with full knowledge of the company's prior selection? We repeat that such a rule, in practical operation, will be subversive of good administration and will work injustice and disorder and create uncertainty, and that it will serve no good or useful purpose.

We cite below some of the numerous cases in which the Land Department, both before and since the case of Sjoli v. Dreschel was decided, has applied the doctrine that a valid railroad indemnity selection has priority over any claim based on set-

tlement or entry initiated or offered after the date of selection although prior to the approval thereof by the Secretary of the Interior.

In collecting these cases we confined our search to decisions rendered during the past fifteen years, and, therefore, since it was established that an executive withdrawal of lands within indemnity limits, in aid of the railway company's right of selection, is unauthorized and void. Many of these decisions were handed down while Mr. Justice Van Devanter was Assistant Attorney General, and the opinion in each of those cases is initialled in a manner which indicates that it was approved, if not prepared, by him. In every case cited below the railroad indemnity selecton was sustained as against a claim initiated after selection, but prior to approval by the Secretary, on the ground of the priority of the indemnity selection, and not upon the ground of an infirmity in the subsequent claim, other than the effect upon such claim of the pendency of the prior selection. Some of the decisions were interlocutory in their nature, but in those cases the paramount priority of the indemnity selection was none the less clearly recognized.

Northern Pacific v. Richards, 22 L. D. 99.

O'Brien v. Northern Pacific, 22 L. D. 135.

St. Paul, Minneapolis & Manitoba v. Lambeck, 22 L. D. 202, 23 L. D. 552, 26 L. D. 429.

South and North Alabama Railroad Co. v. Hall, 22 L. D. 273.

Garrett v. Southern Pacific, 22 L. D. 373.

Romaine v. Northern Pacific, 22 L. D. 662.

Northern Pacific v. Lamb, 23 L. D. 1.

Northern Pacific v. Owen, 23 L. D. 324.

Gamble v Northern Pacific, 23 L. D. 351.

Grinnell v. Southern Pacific, 23 L. D. 489.

Brown v. Northern Pacific, 24 L. D. 370.

Northern Pacific v. Fiebiger, 24 L. D. 375.

Northern Pacific v. Shepherdson, 24 L. D. 417.

Page v Northern Pacific, 24 L. D. 444.

Northern Pacific v. Grimes, 24 L. D. 452.

Chicago, Rock Island & Pacific v. Wagner, 25 L. D. 458.

Hagen v. Northern Pacific, 26 L. D. 312.

Tubbs v. Northern Pacific, 27 L. D. 86.

Kauffman v. Northern Pacific, 27 L. D. 133.

Scanlon v. New Orleans Pacific Railway Co., 27 L. D. 274.

Drew v. Northern Pacific, 27 L. D. 310.

Hanson v. Roneson, 27 L. D. 382.

Dunnigan v. Northern Pacific, 27 L. D. 467.

Southern Pacific v. Cherry, 27 L. D. 470.

Northern Pacific v Wolfe, 28 L D. 298.

Oregon and California Railroad Co. v.. Crewdson, 29 L D. 440.

Oregon and California Railroad Co. v. Johnston, 29 L. D. 442.

Northern Pacific v. Smith, 31 L. D. 151.

Eaton v. Northern Pacific, 33 L. D. 426.

Jones v. Northern Pacific, 34 L. D. 105.

Ferguson v. Northern Pacific, 37 L. D. 260.

Santa Fe Pacific v. Northern Pacific, 37 L. D. 593.

Santa Fe Pacific v. Northern Pacific, 37 L. D. 669.

It will be apparent, upon a moment's reflection, that a vast quantity of land has been disposed of and patented in accordance with this principle. Decisions of the Secretary of the Interior are like decisions of a court of last resort, and control the action of the Department and its subordinate officials in similar cases subsequently arising. When a rule of law is once declared and established by decisions of the Secretary, it ceases to be a subject of debate in departmental litigation. Only the exceptional case reaches the Secretary on appeal. Most cases involving well established principles are finally disposed of by the local officers or by the Commissioner. And the fact that so many cases illustrating the principle that a railroad indemnity selection has priority from the date of filing the selection list have come before the Secretary, indicates that an infinitely greater number of such cases have been disposed of on that principle by the subordinate officials of the Department.

We respectfuly submit that a decision of this court which establishes a different rule of priority in such cases will unsettle a vast number of titles throughout the public land states, and will tend to encourage a great deal of undesirable litigation. And it is common knowledge that most of the land patented to railway companies under the indemnity provisions of the various railroad grants, is now in private ownership.

V.

THE PATENT MUST BE TREATED AS A CONCLUSIVE ADJUDICATION OF ALL QUESTIONS OF FACT OR OF MIXED LAW AND FACT AS TO THE RIGHT OF THE RAILWAY COMPANY TO THE LAND, AND THIS FORECLOSES MOST OF THE OBJECTIONS URGED BY COMPLAINANT AGAINST THE VALIDITY OF THE SELECTION.

The issuance of patent implies and includes an adjudication by a quasi-judicial tribunal, conclusive as to all questions of fact necessarily involved in the determination that the patentee is entitled to the land. Where, as in this case, the land conveyed by the patent is land within the jurisdiction of the Department, the patent is impervious to collateral attack, or to attack in an action at law, upon any ground; and it can only be attacked in equity upon the ground of fraud, plain mistake or palpable error of law. The courts will not, in any form of action, undertake to review any question of fact involved in the determination which the issuance of patent implies. All this is familiar doctrine, and it is unnecessary to cite authorities in its support. But the rule is the same where the adjudication which the patent implies involves questions of *mixed law and fact*.

In Marquez v. Frisbie, 101 U. S. 473, 476, Mr. Justice Miller said:

> "The language of this court in Moore v. Robbins, 96 U. S. 530, 535, cited above, is that equity will interfere 'when it is *clear* (italics

> by the court) that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another.' This means, and it is a sound principle, that where there is a *mixed question of law and of fact*, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."

To the same effect are:

> Green v. Hayes, 70 Cal. 276, 11 Pac. 716.
>
> Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398, 401.
>
> Cook v. McCord, 9 Okla. 200, 60 Pac. 497, 500.
>
> Estes v. Timmons, 12 Okla. 537, 73 Pac. 303, 305.
>
> Bates & Guild Co. v. Payne, 194 U. S. 106, 109.

Now it seems to us that many of the objections which complainant urges against the validity of the original selection by the Railway Company involve questions of mixed law and fact, as to which the judgment of the department is conclusive under the rule referred to. This is obviously true of the proposition that the selection was invalid because there were other lands open to selection, as to which the Railway Company was required to exhaust its right before resorting to the land in controversy; such as land within the first indemnity limits and land nearer to the tract which was the basis for the particular selection. It is also true of certain of the objections based upon supposed irregularities in the selection lists and the proceedings thereon,

and upon an alleged want of authority on the part of the representatives of the Railway Company making the selection.

And we think it is likewise true of the objection that the Northern Pacific Rail*way* Company did not lawfully succeed to the land and land grant rights of the Northern Pacific Rail*road* Company. It seems very plain to us that this question involves an issue of fact as well as an issue of law, and that upon the record in this case those issues cannot be separated so as to resolve the question into one of pure law, within the rule of Marquez v. Frisbie, supra.

FRANK B. KELLOGG,
STILES W. BURR,
OF COUNSEL FOR APPELLEES.

JAN 12 1910
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1908.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD,

Appellants,

vs.

HERBERT H. HOYT.

No. 195. 24

CHARLES D. CAMPBELL,

Appellant,

vs.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD.

No. 176. 12

NORTHERN PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

vs.

FRED WASS and PAULINE WASS.

No. 397. 181

BRIEF FOR APPELLANTS IN No. 195, APPELLEE IN No. 176 AND PLAINTIFF IN ERROR IN No. 397.

CHARLES W. BUNN.

Supreme Court of the United States

OCTOBER TERM, 1908.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD,

Appellants,

vs.

HERBERT H. HOYT.

No. 195.

CHARLES D. CAMPBELL,

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vs.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD.

No. 176.

NORTHERN PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

vs.

FRED WASS and PAULINE WASS.

No. 397.

STATEMENT OF FACTS.

The three cases above entitled are so far alike that they will be discussed in one brief. The Hoyt and Campbell cases are appeals from the United States Circuit Court of Appeals for the Eighth Circuit (re-

ported below 161 Fed. Rep. pp. 324 and 332 respectively). The Wass case is a writ of error to the Supreme Court of Minnesota. The decision of that court followed the decision of the Circuit Court of Appeals in the Hoyt case and is reported 104 Minn. 411. Hoyt claims forty acres and Campbell one hundred and sixty acres of land in Minnesota under the timber and stone law and Wass claims one hundred and sixty acres of land in the same state under the homestead law. Weyerhaeuser and Humbird are purchasers from the Northern Pacific Railway Company. They claim the lands involved in the Hoyt and Campbell cases under the acts of Congress making grants to the Northern Pacific Railroad Company; and the Northern Pacific claims the land involved in the Wass case under the grants made to the Territory of Minnesota by the act of Congress approved March 3, 1857 (11 Stat. 195) and the act of Congress approved March 3, 1865 (13 Stat. 526) as amended by the act of Congress of March 3, 1871 (16 Stat. 588). All three parcels of land were by the land department of the United States decided to belong to the railroad grants and patent for each parcel was issued and delivered to the Railway Company. The Hoyt and Campbell cases are bills in equity; in the Hoyt case the prayer is to charge Weyerhaeuser and Humbird as trustees of the legal title and to compel them to convey, whilst in the Campbell case alternate relief is also prayed, namely, that the patent be can-

celed so as to leave title in the United States open to plaintiff's application to purchase. The Wass case is an action at law of ejectment brought by the Railway Company against Wass to recover possession of the premises. In the Hoyt and Campbell cases the record shows over $2,000 to be involved in each suit.

We can best explain the facts to the court by stating the Hoyt case and differentiating the Campbell and Wass cases. The following statement of facts in the Hoyt case applies to all the cases except as otherwise specified, and our references to the record are, except where otherwise stated, to the transcript in the Hoyt case.

Hoyt asserts that his grantor entered the land under the timber and stone law, which provides for a cash purchase and does not require settlement, and that the United States illegally denied his entry and patented the land to the Northern Pacific Railway Company (successor of the Northern Pacific Railroad Company) which conveyed to Weyerhaeuser and Humbird.

The land lies in Minnesota within what is known as the "second indemnity limits" of the Northern Pacific Railroad Company. Let us explain what the "second indemnity limits" are:

Sec. 3 of the Northern Pacific Railroad charter of July 2, 1864, says:

> "*And be it further enacted*, that there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the

purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections * * *"

This law granted *in the states* the odd sections in a strip of country forty miles in width (twenty on each side of the railroad), which strip of country is called the "place limits," or "granted limits."

It established on each side of the place limits an indemnity belt ten miles in width, within which might be made good by selection lands lost to the company

in the place limits. It says, "other lands shall be selected by the company in lieu thereof, *under the direction of the secretary of the interior,* in alternate sections and designated by odd numbers." This language creates what are called the "first indemnity limits."

Under this act place land losses, wherever occurring, were to be made good *anywhere* within the indemnity belt, regardless of state or territorial lines. And it is admitted law that the losses so to be made good include place lands reserved or disposed of by the United States, or covered by claims, *either before or after the passage of the act,* down to the date of definite location of the railroad.

By the joint resolution of May 31, 1870, amending the Northern Pacific grant of 1864, it is provided:

> "And in the event of there not being in any state or territory, in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of lands that have been granted, sold, reserved, occupied by homestead

> settlers, preempted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four * * *"

This resolution established "second indemnity limits," viz., two strips of land each ten miles wide, one lying on each side of the road outside the "first indemnity limits." The second indemnity region is unlike the first in this: (a) it can be resorted to only for losses *in the same state or territory;* and (b) only for losses occurring *after* the act of July 2, 1864, and prior to definite location.

The title of the Railroad Company to indemnity lands within either indemnity "limit" rests upon *selection approved by the Secretary of the Interior. Humbird v. Avery,* 195 U. S. 480.

The land in suit was selected by the Railroad Company October 17, 1883. The selection list specified losses in bulk, *i. e.,* it stated the losses by specific descriptions and the selections by specific descriptions, each footing up the same number of acres; but it did not assign each selection to a particular loss. At the time the list was filed it conformed in this respect to the rule of the department. The list was received by the Register and Receiver and transmitted to the general land office. April 11, 1893, the Railroad Company, acting under direction of the Secretary of the Interior, rearranged the selection list so as to specify a particular tract lost as the basis for each

selection. In the rearranged list there was set opposite the tract in controversy in the Hoyt case the NW¼ of NE¼ of section 11, township 46 north, range 16 west, in Minnesota. The last described land was the land lost furnishing the basis of the selection and it was within the *place* limits of the Northern Pacific grant, but also in the indemnity limits of the grant to the State of Minnesota for the Lake Superior and Mississippi Company (act of May 5, 1864), and had been selected by and was approved for patent to the State March 26, 1868.

The record is quite voluminous but most of the material facts are set forth in the opinion of the Secretary of the Interior deciding *Jones v. Northern Pacific* (the identical case of Hoyt now here). This opinion is set forth as an exhibit to Hoyt's complaint. (Transcript pp. 33-41.)

The Hoyt and Campbell cases could not have arisen but for the mistake of law of the land department of the United States in holding that the eastern terminus of the Northern Pacific grant was at Duluth instead of at Ashland as asserted by the Railroad Company. This mistake was corrected and the eastern terminus decided to be at Ashland in *Doherty v. Northern Pacific Railway Company*, 177 U. S. 421, and *United States v. Northern Pacific Railroad Company*, id. 435. The lands involved in both the Hoyt and Campbell

cases lie in Minnesota but opposite to that part of the Northern Pacific road east of Duluth. See maps opposite.

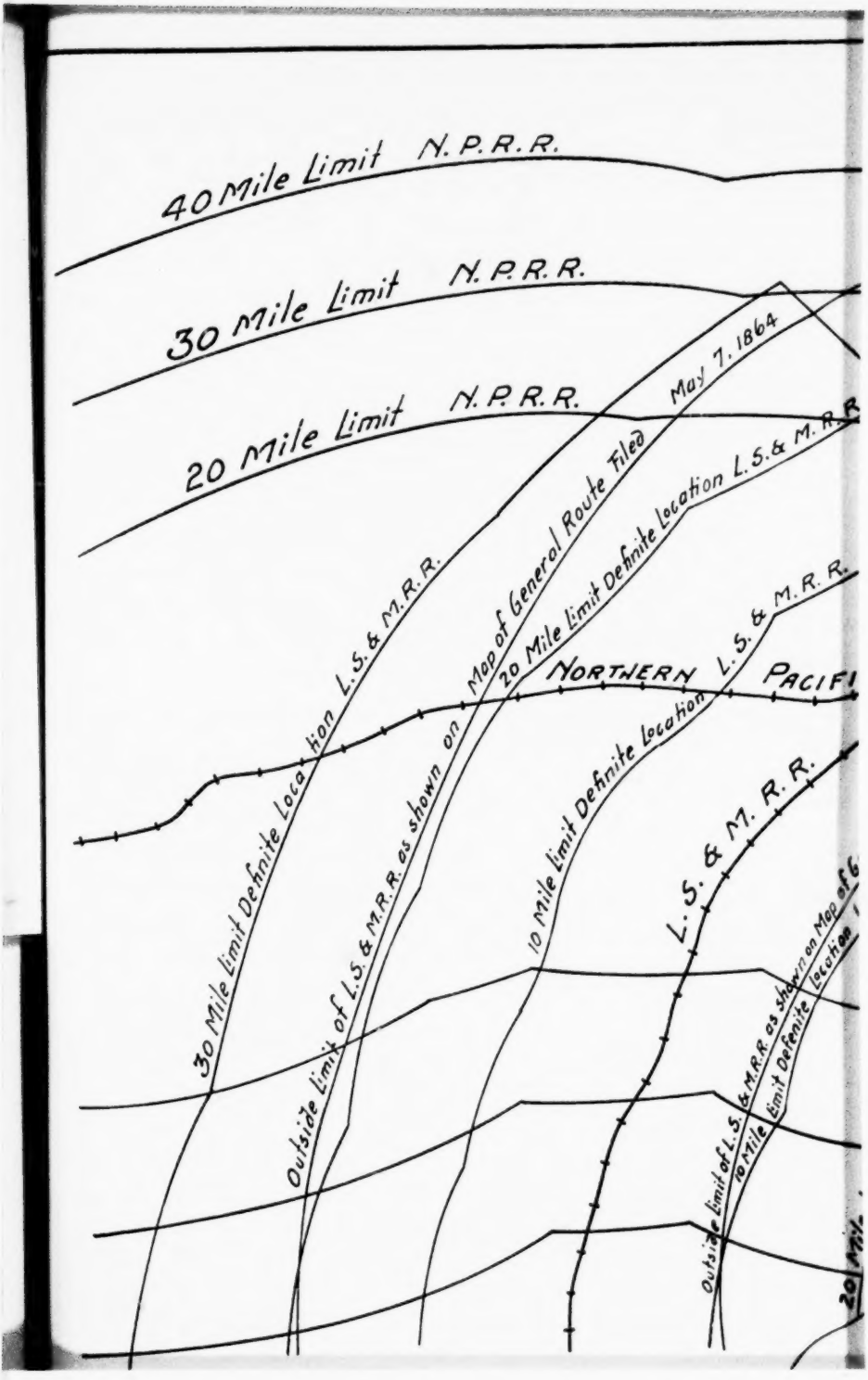
Pursuant to the Secretary's decision of August 27, 1896 (23 L. D. 204) holding that the grant terminated at Duluth, the Hoyt and Campbell selections were canceled March 22, 1897, but only because east of Duluth. After the decisions of this court above cited they were reinstated. Between the cancellation of the selections and before they were reinstated, to-wit, on December 17, 1897, Richard B. Jones filed his application as below stated and made his final proof on the 10th of December, 1898. But before the date last named the land was withdrawn from all entry by virtue of the departmental order of February 28, 1898 (26 L. D. 265) which order was made to preserve the selections and the *status quo* until this court should decide the then pending cases above referred to (Transcript pp. 33, 34).

While the land department was in error as to the Railroad Company's eastern terminus and before the court announced decisions in the cases above referred to, Richard B. Jones made an application to enter the land involved in the Hoyt case under the act of Congress approved June 3, 1878, as amended by act of August 4, 1892, commonly known as the "timber and stone law." December 10, 1898, he filed his proofs and paid to the Receiver one hundred dollars, being the purchase price of the land, and thereupon received a receiver's receipt, across the face of which was written: "Subject to any claim the Northern Pacific Railroad Company may have to the land herein described." The Railroad Company's selection

had then been fifteen years of record in the land office against this land, of which fact Jones, when he offered his proofs and money, had emphatic notice. He also was then notified that the land was withdrawn awaiting the result of litigation (Transcript pp. 13, 14, 15, 33, 34). By special warranty deed dated December 19, 1908, Jones conveyed to Minnie Stewart; and on March 22, 1902, Minnie Stewart conveyed to the complainant Hoyt.

The decisions of this court holding the eastern terminus to be at Ashland were announced in April, 1900. On the 2nd of December, 1901, the Commissioner of the General Land Office, on appeal from the action of the local land officers allowing the Jones entry, directed a cancellation of that entry because of the prior selection of the Railway Company. On appeal the Commissioner's decision was affirmed by the Secretary of the Interior August 30, 1905. The Secretary then approved the Railroad Company's selections of the lands involved in the Hoyt and Campbell cases, and on October 18, 1905, patent for these lands issued to the Northern Pacific Railway Company (Transcript pp. 9, 103), which company conveyed by warranty deed to Weyerhaeuser and Humbird.

The case of Campbell is in all of its facts like the case of Hoyt—except that in the Hoyt case the plaintiff's assignor paid his money to the Receiver of the Land Office, taking a receipt in terms subject to the Railway Company's rights, whilst Campbell's application to enter, made October 26, 1895 (Transcript Campbell Case p. 4), was rejected by the land officers and his case stands upon that rejection, he never having tendered his proofs or payment for the land or done


40 Mile Limit N.P.R.R.
30 Mile Limit N.P.R.R.
20 Mile Limit N.P.R.R.
May 7. 1864
Map of General Route Filed
20 Mile Limit Definite Location L.S.& M.R.R.
30 Mile Limit Definite Location L.S.& M.R.R.
Outside Limit of L.S.& M.R.R. as shown on
10 Mile Limit Definite Location
L.S.& M.R.R.
NORTHERN
L.S.& M.R.R.
PACIFI
Outside Limit of L.S.
10 Mile
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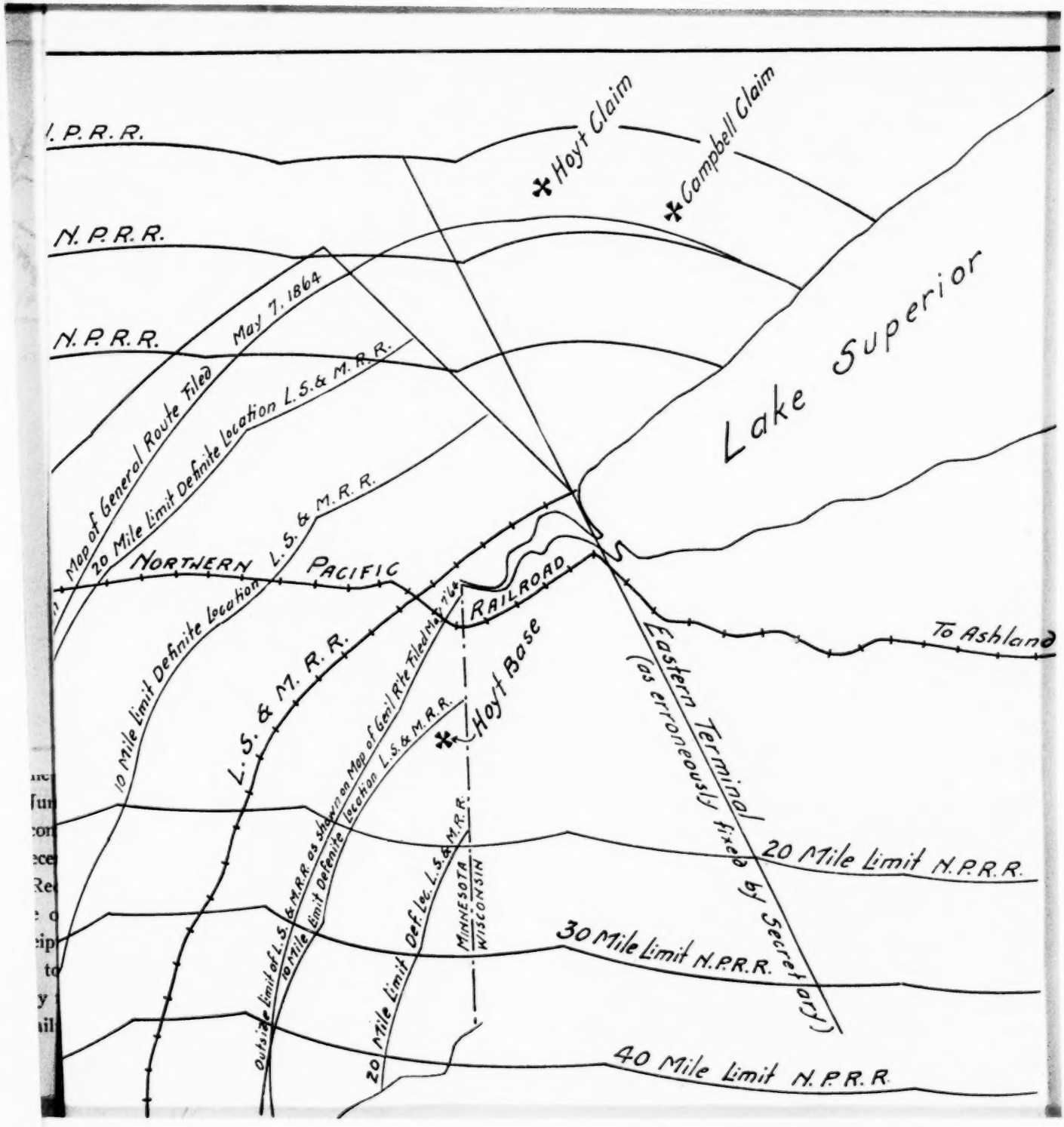
I. P. R. R.
N. P. R. R.
N. P. R. R.
Hoyt Claim
Campbell Claim
Lake Superior
Map of General Route Filed May 7, 1864
20 Mile Limit Definite Location L. S. & M. R. R.
NORTHERN PACIFIC RAILROAD
L. S. & M. R. R.
10 Mile Limit Definite Location
L. S. & M. R. R.
Hoyt Base
Eastern Terminal (as erroneously fixed by Secretary)
To Ashland
Outside Limit of L. S. & M. R. R. as shown on Map of Gen'l R'te Filed May 7/64
10 Mile Limit Definite Location L. S. & M. R. R.
20 Mile Limit Def'l Loc. L. S. & M. R. R.
MINNESOTA
WISCONSIN
20 Mile Limit N. P. R. R.
30 Mile Limit N. P. R. R.
40 Mile Limit N. P. R. R.

anything farther but to allege in his bill a quite uncertain and indefinite willingness and readiness to pay (Transcript Campbell Case pp. 5-9, 18, 19). The Campbell case differs from the Hoyt case in one other respect, namely, that the lost land furnishing the selection basis lies farther west in Minnesota and is not, like the land in the Hoyt case, within indemnity limits of the Lake Superior and Mississippi grant.

The land involved in the Wass case is within the indemnity limits of the grants to the Territory of Minnesota made in the acts of Congress above referred to. The State of Minnesota conferred the benefit of these grants on the Western Railway Company of Minnesota by legislative act of March 1, 1877. This company filed a selection against the land in suit on the 31st day of December, 1877, and on the 4th of December, 1889, the St. Paul and Northern Pacific Railway Company (successor in interest to the Western Railway Company) filed in the land office an amended selection list assigning for each selection a particular and described loss. The matter appears to have stood without action in the land department until ten years later when, in the month of April, 1899, Fred Wass entered upon the land with the intention of making it a homestead and has ever since been in possession. On the 4th of December, 1899, Wass presented to the land office an application to enter under the homestead laws. The Register and Receiver filed his application, but on the same day rejected it and refused to receive the fees tendered, basing such refusal and rejection upon the ground that the lands filed for were embraced in the then pending though unapproved selection of the St. Paul & Northern Pacific Railway Company.

Wass appealed and the action of the local land office was affirmed by the Commissioner of the General Land Office and by the Secretary of the Interior respectively. Thereupon the Secretary of the Interior on February 16, 1905, approved the selection of the Railroad Company and on March 15, 1905, issued patent to the State of Minnesota, the state issuing its patent in turn to the Western Railway Company of Minnesota. All rights under the patent have become vested in the Northern Pacific Railway Company the plaintiff in error. The selection right under the grant to the Territory of March 3, 1857, appears to be identical with that under the Northern Pacific act of July 2, 1864, section 1 of the 1857 act (11 Statutes at Large 195) giving the right of selection "Subject to the approval of the Secretary of the Interior." The facts in the Wass case are set forth in the answer of Wass (Transcript in No. 397, pp. 6-10).

Hoyt and Campbell seek in their bills to cast a doubt upon the right of the Northern Pacific Railway Company, which is a Wisconsin corporation, to claim as successor in title to the Northern Pacific Railroad Company, the federal corporation, alleging that under the acts of Congress the Rail*road* Company had no power to execute more than one mortgage, and alleging (or leaving it to be inferred) that the Railway Company's title came through foreclosure of a *second* mortgage made by the Rail*road* Company. But the answer and proofs show that the land grant lands, including those in suit, of the Northern Pacific Railroad Company lying in Minnesota were never covered by *any* mortgage executed by the Rail*road* Company but on the contrary were purchased by the Railway Com-

pany under decrees of the United States Court for the District of Minnesota in a general creditor's suit.

The same plaintiffs set up certain legislation in Wisconsin creating the Superior & St. Croix Railway Company, and allege that the Northern Pacific Railway Company is *successor* of the Superior & St. Croix; and that under the Wisconsin legislation the Northern Pacific Railway Company has no right to take or hold any lands not necessary for the operation of its railroad. But the bills and answers make it plain that the Northern Pacific Railway Company is the Superior & St. Croix Company, and not its successor, the change being one of name. The act of Wisconsin of 1895, sec. 7, clearly gives the company the power to purchase the land in suit.

QUESTIONS IN THE CASE.

Proper errors are assigned in each case to cover the questions below stated.

The suit of Hoyt was decided by the Circuit Court of Appeals in his favor, on the ground that the Secretary of the Interior's approval of the Railway Company's selection and the patent to the Railway Company were without authority and void; that the Secretary had no discretion or right to approve this selection, it not having been acted upon when Hoyt's grantor applied to purchase, but was by such application to purchase deprived of all jurisdiction and right to consider the selection and absolutely bound by law to grant the application to purchase; that for this reason the appellants hold their title under the patent as trus-

tee for Hoyt and should be decreed to convey to him.

The Circuit Court of Appeals decided the Campbell case the other way, distinguishing it from the Hoyt case, in that the Receiver of the land office refused to accept Campbell's application and proofs, whilst he did receive the application and proofs and took the money of Hoyt's grantor (though at the same time advising him of the Railway Company's claim on file and giving him a receipt for his money across the face of which was written "Subject to any claim the Northern Pacific Railroad Company may have to the lands herein described"). That Hoyt's grantor actually paid his money to the Receiver of the land office and filed his proofs, in the opinion of the Circuit Court of Appeals, segregated the land from the public domain, so that the Secretary could not after that approve the selection; whilst Campbell's money and proofs the land officers refused to receive, thus leaving the land free of any claim of record; and being so free of claims of record the Circuit Court of Appeals held left the selection under the Secretary's jurisdiction.

In the Wass case the application was not to make a cash purchase but to obtain the land as a homestead. The land officers wholly rejected the application and refused to accept the fees required by law and refused to enter application of record in the land office.

The controlling proposition held by the court below in the Hoyt case is, that notwithstanding the grantee under an act of Congress has suffered a loss and has done everything possible to make selection of indemnity therefor according to law, such selection is ineffective without approval by the Secretary of the Interior; and *that the Secretary cannot legally grant*

that approval after an entry of the land under any public land law, notwithstanding the railroad selection was the first entry, either attempted, or of record in the land office, and notwithstanding the land was free public land subject to the selection at the time of its filing. In the Campbell and Wass cases the local land office had refused *in toto*, in the Campbell case the application to purchase, and in the Wass case the application to homestead. The Hoyt case differs only in the fact that the local land officers erroneously took the applicant's money and filed his entry advising him distinctly that this was subject to the Railroad Company's rights. The Circuit Court of Appeals on this difference in facts decided the Hoyt case against the Railway Company's grantees and the Campbell case for them, whilst the Supreme Court of Minnesota in the Wass case reluctantly followed the Circuit Court of Appeals in the Hoyt case, in effect overruling its own previous decisions in *McHenry v. Nygaard*, 72 Minn. 2, and *Sage v. Swenson*, 64 Minn. 517, though the facts in the Wass case seem like those of the Campbell rather than the Hoyt case.

Opposing counsel in the Hoyt and Campbell cases assert however other propositions (mostly immaterial to the Wass case) which must be noticed. He says:

1. That the Northern Pacific *Railway* Company, as distinguished from the Northern Pacific *Railroad* Company, could take no title, because (a) it did not succeed to the rights of the *Railroad* Company touching the land in suit, (b) the act of Wisconsin of 1895, constituting the charter of the *Railway* Company, section 7 of which confers the right to buy the Northern

Pacific grant, is unconstitutional, as being special legislation.

2. That the loss which was the basis of the selection in the Hoyt suit was not a good loss, because not within the Northern Pacific place or granted lands, by force of the proviso in section 3 of the Northern Pacific grant reading: "*Provided*, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line the amount of land heretofore granted shall be deducted from the amount granted by this act." The assertion is, that the Lake Superior and Mississippi grant and the Northern Pacific grant were upon the same general line, and that by reason of the language quoted the lands falling within the grant to the Lake Superior and Mississippi Company were to be deducted from that to the Northern Pacific.

3. That should the last assertion be unsound counsel still contends that the lost lands furnishing the basis of selection in the Hoyt case, even if within the Northern Pacific granted limits, being appropriated to an earlier grant, namely, one of May 5, 1864, may furnish a good basis, for *first* but not for *second* indemnity selections under the Northern Pacific grant; having been, it is asserted, lost to that grant *before* its passage.

4. That the Railroad Company's selections of the lands in suit was irregular, informal, or invalid, because (a) made originally without the assignment to each particular selection of some specific and described loss, and (b) that the loss and the lands selected in

lieu thereof were upon different sides of the track (which is true in the Hoyt and Campbell cases).

5. That the land involved in the Hoyt suit falls within the provisions of the sundry civil bill of July 1, 1898, and should under that bill have been awarded by the Secretary of the Interior to the claimant adverse to the Railway Company.

ARGUMENT.

1. We shall attempt first to show, that the Circuit Court of Appeals erred in holding in the Hoyt case the Secretary's approval of our selection to be beyond his jurisdiction and void.

This conclusion is reached only by saying (as the Circuit Court of Appeals did say) that the entry at the land office of Hoyt's grantor Jones made Jones "from the moment of that purchase" "the owner of the entire beneficial interest in and equitable title to it" leaving in the United States "the naked legal title which it held in trust for him."

But we submit this is begging the whole question, which is whether the entry of Jones did make him the equitable owner. If it did there is an end of the Hoyt case. But the very question in that case is whether Jones got any rights, and if so what rights, by his entry as against the selection. To determine this question we cannot start with his entry, but must look at the events touching this title in the order of time.

And in the order of time we find first that the Northern Pacific, having suffered a loss (as we shall try to show later) entitling it to select indemnity,

found this piece of vacant public land, against which there were no claims or rights, of record in the land office or otherwise; and on the 17th day of October, 1883, it entered a selection of that land at the land office. It followed up the selection and some years later altered its form to comply with new regulations of the department.

Such a selection filed and recorded, as it was, against this land in the land office, the land department has uniformly regarded as an *entry* and as having the same effect to segregate the land from the general bulk of public lands that any other entry has. *Porter v. Landrum*, 31 L. D. 352; *Southern Pacific Railroad Co.*, 32 L. D. 51; *Santa Fe Pacific Railroad Co.*, 33 L. D. 161; *Eaton, et al., v. Northern Pacific Railway Co.*, 33 L. D. 426; *Santa Fe Pacific Railroad Co. v. Northern Pacific Railway Co.*, 37 L. D. 669. The well settled rule is stated as follows by the then Assistant Attorney General (now United States Circuit Judge) Willis Van Devanter in *Southern Pacific Railroad Company*, 32 L. D. 51:

> "Under this legislation the company was, by the direction or regulations of the Secretary of the Interior, required to present at the local land office selections of indemnity lands, and these selections, when presented conformably to such direction or regulations, were to be entertained and noted or recognized on the records of the local office. When this was done the selections became lawful filings; and while, until approved and patented, they would remain subject to examination, and to rejection or cancellation where found for any reason to be unauthorized, they, like all other filings, were entitled to recognition and protection so long as they remained undisturbed upon the records.

There is no question in this case as to the sufficiency of the loss assigned, or as to the formality and regularity of the selection.

What effect has been given to a pending railroad indemnity selection?

Prior to 1887 the rights of a railroad company within the indemnity belt of its grant were protected by executive withdrawal, but on August 15, that year, these withdrawals were revoked, and the land restored to settlement and entry; but such orders, although silent upon the subject, were held not to restore lands embraced in pending selections. (*Dinwiddie v. Florida Railway & Navigation Co.*, 9 L. D. 74). In the circular of September 6, 1887 (6 L. D. 131), issued immediately after the general revocation of indemnity withdrawals, it was provided that any application thereafter presented for lands embraced in a pending railroad indemnity selection, and not accompanied by a sufficient showing that the land was for some cause not subject to the selection, was not to be accepted, but was to be held subject to the claim of the company under such selection. In fact, a railroad indemnity selection, presented in accordance with departmental regulations and accepted or recognized by the local officers, has been uniformly recognized by the land department as having the same segregative effect as a homestead or other entry made under the general land laws."

This is not saying that the selection before approval by the Secretary confers the least right or title, and is therefore entirely consistent with *Humbird v. Avery*, 195 U. S. 480. But that the selection duly recorded at the land office is an entry, which may ripen into title if afterwards approved by the Secretary, as held by Judge Van Devanter, is a proposition, not only uniformly held by the land department, but well established by decisions of this court.

In *Oregon & California Railroad Company v. United States,* 189 U. S. 103, Mr. Justice Harlan delivering the opinion stated the precise point, saying (p. 112):

> "Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits—which interest relates back to the date of the granting act—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the Land Department; and then its right relates to the date of the selection."

In *Shepley v. Cowan,* 91 U. S. 330, the court considered a conflict between a pre-emption claim and a selection on behalf of the State of Missouri under an act of Congress conveying to the state five hundred thousand acres of land *to be selected* by the Governor, the act providing that if the selection should be approved by the Secretary patents were to issue. The court (p. 337) said touching conflicts between such right of selection and a pre-emption:

> "The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a State selection takes effect as of the time when the selection is made and reported to the land-office; and the patent upon a pre-emption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land-office."

On page 338, after distinguishing *Frisbie v. Whitney*, 9 Wall. 187, and *Yosemite Valley Case*, 15 id. 77, the Court said:

> "But whilst, according to these decisions, no vested right as *against the United States* is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

The exact proposition was the basis of decision in *McCreery v. Haskill*, 119 U. S. 327. In that case the State of California had the right to select lands, the act requiring the selection before becoming effective to be approved by the Secretary of the Interior. The case involved a conflict between a selection by the state made April 22, 1868, and afterwards approved by the Secretary, and a settlement claim instituted one year and eight months after the selection but before the Secretary's approval. The court held that the land was open to both claims, to selection on behalf of the state and to settlement and pre-emption by settlers, and held that a selection approved by the Secretary at a later day related back to its filing and cut out the claim under the settlement laws.

The question seems to have been decided in this court at a much earlier date. We refer to *Campbell v. Doe*, 13 Howard 244. That case came up from the Supreme Court of Ohio, where it was reported in 17 Ohio 267, and the controversy before coming

into court had been waged before the Secretary of the Treasury, Roger Brooke Taney (whose powers then included control of public lands). The case involved an act of Congress passed on the 20th of May, 1826, which authorized selection by the Secretary of the Treasury of certain lands for school purposes. The board of county commissioners of the County of Lawrence filed in the local land office in Ohio a request that the Secretary of the Treasury select certain lands for school purposes under this law. The Register transmitted the selection to the Commissioner of the General Land Office. Afterwards Robert Hamilton applied at the local land office in Ohio to enter the land and was informed of the selection and that on that account the land was withheld from sale. Thereupon Hamilton with the assent of the Register of the Land Office entered and paid for the quarter section and took a final receipt. The Secretary of the Treasury afterwards approved the request of the Commissioners of Lawrence County and selected the land for school purposes under the act of Congress. The case was submitted to the court upon an agreed statement of facts and under stipulation that should the court be of opinion that the entry by Hamilton was valid, notwithstanding the then pending unapproved selection, judgment should be entered for the defendants, otherwise for the plaintiff.

In this court Mr. Vinton, in support of the selection, argued:

> "The title thus vested in the State * * * reaches back to the date of the original selection of the land for schools, and the report of it, as such, to the Commissioner of the General Land Office. * * * The selection of the land * * *

> and the report of it, by the Register, to the General Land Office, by direction of the Secretary, for his decision thereon, being necessary and proper preliminary steps towards carrying the act into execution, had the effect in law to sever the land thus selected and reported from the mass of the public lands until his decision was had; and, when approved by him, the whole proceeding was in law one act, and constituted the selection by the Secretary required by the act."

The court said it was clear that the Secretary of the Treasury had power under the act of Congress to make the selection, notwithstanding the intervening entry of Hamilton, and affirmed the judgment of the Supreme Court of Ohio which had been in favor of the selection.

When Jones, the grantor of Hoyt, went to the land office December 17, 1897 he found the selection entry of the railroad company there of record and ordered canceled only because it was east of Duluth. It had been so of record for over fifteen years unacted upon by the Secretary. Such delays are not uncommon. The duties of the Secretary are judicial. He must determine in the first place whether there are deficiences in the grant giving the right to select, and in the second place whether the particular lands selected can properly be taken for those deficiencies, *Wisconsin Central Railroad Co. v. Price County*, 133 U. S. 496, 511. When Jones offered his proofs and money in December, 1898, the land was withdrawn to await the court's decision and he was most distinctly advised of the inception of a right in the railroad company, which might ripen into title by the Secretary's approval, and he chose with open eyes to buy into that contest. He is entitled to no equitable consideration

and should stand on his legal right. *Campbell v. Doe, supra.* To Hoyt, Campbell and Wass the language clearly applies which was used by the court in *Gertgens v. O'Connor,* 191 U. S. 237, 246:

> "It is well to look further into his equities. It will be borne in mind that he did not go upon the land until April, 1891. The tract was within the indemnity limits of the company's grant, and was, therefore, subject to selection. It had been withdrawn from entry under the land laws, and that fact appeared on the records of the local land office. It had, in fact, been selected by the company, and that selection had not been cancelled. Ireland's contract of 1883 was of record in the office of the register of deeds of the county, and shown on the books of the company. The defendant applied for leave to enter the lands as a homestead, and was denied such leave by the local land officers on the ground that it was within the twenty-mile indemnity limits of the railway company's grant, and had been selected by the company. He was charged with knowledge of the act of Congress giving a preferential right of purchase from the government in case the company's title should in any way fail. Notwithstanding all this, he remained upon the land and put his improvements on it, and now claims to be entitled to the rights of a *bona fide* settler. He does not come within the letter of the statute, nor does he come within the reach of any reasonable equities. He evidently took his chances on the possibility of the company's failing to obtain title and a subsequent failure of Ireland to insist upon his preferential right of purchase. He went upon the land with full knowledge of all the facts, which showed that he had no right to enter, speculating upon possibilities which have not been realized, and having so speculated he cannot complain if he suffer the consequences which often attend the failure of a speculation."

To say, that by his application and payment under the circumstances, Jones acquired *"entire beneficial interest and equitable title"* and reduced the title of the United States to a *"naked legal title,"* is not only to beg the question, but to contradict the well settled authorities in the land department and the decisions of this Court above cited.

Jones and his grantees cannot complain of the doctrine of relation being applied to them, and only by so applying it can justice be done. Certainly the right to select indemnity is clearly provided in the land grants and was intended to be a valuable right. Owing to the enormous areas comprised within those grants and the limited force in the department of the interior, it is customary that many years elapse before a selection can even be considered. The grantee entitled to select of necessity files in the land department a selection claim specifying particular land. That selection, like any other entry in the land department, becomes a matter of record against that land. When the Secretary reaches consideration of the selection and approves it, equity, legal analogies, and the rules applied to all other entries at the land office require, that the approval and patent should be held to reach back to the inception of the claim. This doctrine is applied to all entries under the public land laws, and necessarily so, because time must elapse before they can be consummated, and in order to preserve the right in the interim approval and patent must relate back to the filing of the claim in the land office; or to put the matter in another way, what the Secretary was called upon to decide and what he did decide was that the selection was valid *when filed*.

The doctrine of relation has been defined as follows:

"Where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred; and to this the other acts shall have relation." *DeForest v. Ramsey*, 3 Cow. 75, 80.

"There is no rule better founded in law, reason, and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." *Landes v. Brant*, 10 How. 348, 373.

"By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had. Thus, in the present case, the patent, which was issued in 1862, is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the recorder of land titles under the act of Congress. At that time the title of the claimant to the land desired by him had its inception, and so far as it is necessary to protect his rights to the land, and the rights of parties deriving their interests from him, the patent is held to take effect by relation as of that date." *Gibson v. Choteau*, 13 Wall. 92, 100.

See, also,

United States v. Anderson, 194 U. S. 394;
Musser v. McRae, 44 Minn. 343.

In the recent case of *United States v. Detroit Lumber Co.*, 200 U. S. 321, 334, the court said:

"If it be contended that, by virtue of the contracts for the sale of timber, it had acquired some

interest in the lands prior to the issue of patents, it is sufficient to say that by the doctrine of relation the patents, when issued, became operative as of the dates of the entries. It is true that this doctrine is but a fiction of law, but it is a fiction resorted to whenever justice requires. It is that principle by which an act done at one time is considered to have been done at some antecedent time. It is a doctrine of frequent application, designed to promote justice. Thus, a sheriff's deed takes effect not of its date, but of the time when the lien of the judgment attached. The ordinary railroad land grants have been grants *in praesenti*, and under them the title has been adjudged to pass, not at the completion of the road, but at the date of the grant. *Leavenworth, Lawrence & Galveston Railroad v. United States*, 92 U. S. 733; *St. Paul, etc., Railway Co. v. Phelps*, 137 U. S. 528; *St. Paul & Pacific v. Northern Pacific*, 139 U. S. 1; *United States v. Southern Pacific Railroad*, 146 U. S. 570. A patent from the United States operates to transfer the title, not merely from the date of the patent, but from the inception of the equitable right upon which it is based. *Shepley v. Cowan*, 91 U. S. 330. Indeed, this is generally true in case of the merging of an equitable right into a legal title. Although the patents in this case were not issued until after the sales of the timber, yet when issued they became operative as of the date of the original entries. This doctrine has frequently been recognized by this and other courts. *Landes v. Brant*, 10 How. 348; *Lessee of French and Wife v. Spencer*, 21 How. 228; *Stark v. Starrs*, 6 Wall. 402; *Lynch v. Bernal*, 9 Wall. 315; *Gibson v. Chouteau*, 13 Wall. 92; *Simmons v. Wagner*, 101 U. S. 260; *Jackson v. Ramsey*, 3 Cow. 75; *Welch v. Dutton*, 79 Ill. 465; *Ormiston, Guardian, v. Trumbo, Admr.*, 77 Mo. App. 310. In the first of these cases it was said (p. 372):

"To protect purchasers, the rule applies, "that where there are divers acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred; and to this the other acts shall have relation," as stated in Viner's Abr. tit. Relation, 290. * * *

'Cruise on Real Property, vol. V., pp. 510, 511, lays down the doctrine with great distinctness. He says: "There is no rule better founded in law, reason and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." ' "

Should it be said that relation cannot cut out the rights of third persons, that again would be begging the question, for the very inquiry at issue is what rights can be acquired by intervening applicants. Relation is never applied except to cut out intervening alleged rights. The assertion of such rights is necessary before the rule can come into play. It is a general principle that relation is enforced for the furtherance of justice, but is not applied to defeat intervening rights or equities of innocent third persons. But Jones and his grantees are not innocent third persons or purchasers in good faith without notice. Certainly one who applies to enter public lands, against which there is already a filing of record of which he is advised, is not a purchaser without notice. Jones had emphatic notice, but elected to enter a contest: there is no equitable reason why the principle of the decisions before cited, "prior in time first in right," should not apply to his case.

The whole contention to the contrary is based upon the language used in the opinion in *Sjoli v. Dreschel,*

199 U. S. 564. Having in mind the danger of applying general language to facts not involved in the case before the Court, which Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 399, warned us against, it is most important to note carefully the facts in the Sjoli case. These were, that Sjoli being a qualified homesteader settled upon the land in 1884 with the intention to make it a homestead. He grubbed and broke part of it, built a house and stable thereon and moved into the house with his family in October, 1884. He had lived with his family upon the premises continually ever since, had broken twenty-two acres and had constructed fences and other improvements of the value of five hundred dollars. He was in occupation of the land, claiming it as a homestead *before the railway company filed its selection.* In 1889 he applied for patent and followed up his application so that in June, 1901, his entry *was approved and patent issued to him.* The other party to the suit, Dreschel, had no title except such as was conferred by a *selection disapproved by the Secretary.* In that case therefore the homesteader was first in time, and the Secretary had disapproved the subsequent selection on the very principles for which we contend. The approval of his application related back to his settlement to cut out the railroad selection. In this case on the contrary the selection was filed when the land was vacant and unappropriated, many years before the attempt to place of record a hostile claim and the entry was *subject* to the selection. Moreover, the Secretary approved the selection and issued the patent to the selector. There is nothing in *Sjoli v. Dreschel* holding that the Secretary *must* disapprove a selection merely be-

cause of a later entry, because the court takes pains to point out that the selection had been *disapproved* in the Sjoli case, and repeatedly alludes to the fact that Sjoli's settlement *was prior in time.*

Mr. Justice Harlan says, on page 566, that until selections are approved by the Secretary lands embraced in the selection lists are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws. This was a sufficiently accurate statement as applied to the facts of that case; but we submit, that the language could not have been intended to go entirely outside of those facts, to determine cases whose facts are essentially different and to overrule the settled decisions of this court and of the land department. It is admitted, that until the selection is approved by the Secretary, land subject thereto is in the control and jurisdiction of the department, and that the selection confers no title upon the selector. This was held in *Humbird v. Avery*, 195 U. S. 480. It is admitted that land under an unapproved selection is subject to be disposed of by the United States. This is the result of many decisions. And the further statement that such land may be entered under the pre-emption and homestead laws may be admitted to its fullest extent so far as these cases are concerned.

But the question is, what is meant by saying that such land is subject to entry under the pre-emption and homestead laws? Simply we submit what was held in *Oregon & California Railroad Company v. United States, Shepley v. Cowan, McCreery v. Haskill, Campbell v. Doe*, before cited, namely, that entries may be filed which operate to create a contest

and also to take the land providing the selection is *disapproved*. *La Bar v. Northern Pacific R. R. Co.*, 17 L. D. 406, was such a case. But there is no ruling in the Sjoli case that such selections *if approved* will not relate back and cut out intermediate filings. We contend that it was never intended in the Sjoli case to decide more than, that such filings might be made to be passed on by the Secretary in connection with the selections. This interpretation of the language brings the case into complete harmony with previous decisions of the court, and the construction contended for by opposing counsel makes the decision conflict with what was before decided. Mr. Justice Moody, when attorney general, in opinion of June 19, 1906, considered this question at length and decided in favor of our contention. Opinions of Attorneys General, vol. 25, p. 632.

Our contention is made more evident when we consider the statement of Mr. Justice Harlan in the opinion, that the propositions laid down in the Sjoli case are laid down in numerous decisions of the court (n. p. 566). For, whilst these decisions support our interpretation of the language of the court, not one of them supports the contrary interpretation.

To infer from the language of the opinion in the Sjoli case the proposition that an application to purchase under the land laws *ipso facto* annuls a prior selection and withdraws it from the consideration of the Secretary is contrary to the decision written by Mr. Justice Harlan in *Humbird v. Avery*, 195 U. S. 480. In that case it appeared that the railway company had filed certain selection lists (which included the very selections here involved in the Hoyt and Campbell

cases) and that entries under both the homestead and other laws had afterwards been made; that the land department had not acted upon either the selections or the entries. The suit was brought relying upon the unapproved selections, an important item of relief prayed being the restraint of threatened trespass by cutting timber. The Assistant Attorney General was allowed to intervene in the case, and pressed upon the court the proposition that lands in this status were still under the jurisdiction of the land department; that *it must act upon the selections and determine their regularity and validity before the matters complained of could be carried into court for adjudication.* This court sustained the argument and in substance sent the case to the department for it to decide as between the selections and the entries. It was not suggested by any counsel that the mere filing of an entry voided a prior selection, and had that been the view of the court the decision must have been that the railway company had no equity or standing before the department and the department no jurisdiction, except to pass upon the entries disregarding the selections.

If we are right in contending that the Secretary had jurisdiction to approve the selections, all three cases under discussion are thereby disposed of in so far as concerns the questions on which they were all decided below. The Campbell case was decided in our favor by the Circuit Court of Appeals on the ground of differences between that case and the Hoyt case—mainly upon the ground that Campbell had no entry in the land office whilst Hoyt's grantor had. The question whether the Campbell case was rightly decided below (assuming that the Hoyt case was also right-

ly decided) we submit upon the opinion of the Circuit Court of Appeals and upon the argument by counsel associated with us in the Campbell case. However, if the decision of the Campbell case below is sound, it ought, we submit, to control the Wass case, because Wass like Campbell never had an entry in the land office which could segregate the land from the public domain and thus avoid the selection; and Wass like Campbell was distinctly advised of the selection and elected to engage in a contest.

This leaves certain other questions raised by counsel in the Hoyt and Campbell suits to be considered.

2. It sufficiently disposes of all objections to the right of the Northern Pacific *Railway* Company as distinguished from the Northern Pacific *Railroad* Company, to say that Hoyt and Campbell cannot raise the question. If the Railway Company is not the successor of the Railroad Company the result is that the *Railroad* instead of the *Railway* Company is entitled to the land. Whilst this might give the Railroad Company the right to recover the title, it does not help either of these plaintiffs. They sue to charge the defendants as trustees of the legal title for *them*—and in the Campbell case it is prayed in addition that the land be restored to the public domain. But if the selections are otherwise good (and the Secretary has held them good) they cut out both Hoyt and Campbell, and it does not aid them to assert that the Railroad Company instead of the Railway Company should have had the land.

However, it may be well to point out that the *Railway* Company has purchased and succeeded to all the rights of the *Railroad* Company. The proofs show

that upon a bill filed by judgment creditors (not mortgage creditors) of the Northern Pacific Railroad Company, the Circuit Court, May 27, 1896, entered a decree of sequestration and appointed receivers (Transcript pp. 177-183). April 27, 1899, a final decree of sale was made, amended May 25, 1899 (Transcript pp. 145-156), ordering the sale to pay debts of all the lands in Minnesota, and rights to receive lands under grants from Congress or otherwise of the Northern Pacific Railroad Company. The Master's report of sale (Transcript pp. 156-177) was filed August 26, 1899, and a final decree confirming the sale was entered September 20, 1899 (Transcript pp. 184-187). The Master's report showed that the sale was made to the Northern Pacific Railway Company and it became a party to the final decree confirming the sale. The Circuit Court is therefore shown formally to have adjudicated in a proceeding properly before it the successorship of the Railway Company to the Railroad Company so far as the lands in suit are concerned. The plaintiffs' allegation impeaches this decree.

The land having passed to the Railway Company in the manner shown, the question whether the mortgages executed by the Railroad Company and foreclosed against it in other proceedings in the Circuit Court (which mortgages did not cover the land in suit) were lawfully executed and properly foreclosed, is immaterial.

The proofs moreover show that in addition to the deed of the Special Master to the Railway Company and the deed of the receivers of the court to the Railway Company (Transcript pp. 189-197), the Northern Pacific Railroad Company under the pro-

visions of the decree executed and delivered a deed to the Railway Company, which conveyed all the lands and rights to land of the Railroad Company in the State of Minnesota. (Transcript pp. 197-201.)

And notwithstanding that the plaintiffs are in no position to raise the objection, we desire to show to the court that the Wisconsin act of 1895, printed as an exhibit to the bill (Transcript pp. 55-65), which authorizes the Superior & St. Croix Railroad Company, now Northern Pacific Railway Company, to purchase the railroad of the Northern Pacific Railroad Company (section 7 of which authorizes the company to purchase its land grant) was valid legislation. It was an act amending a private and local law of 1870, creating the Superior & St. Croix Railroad Company. November 7, 1871, an amendment to the constitution of Wisconsin was adopted, prohibiting certain special legislation. Among other kinds, legislation "for granting corporate powers or privileges, except to cities." In *Attorney General v. Railroad Companies*, 35 Wis. 425, and *Black River Improvement Company v. Holway*, 87 Wis. 584, it had been held, before the passage of the act of 1895 referred to, that the constitutional amendment did not impair the power of alteration and amendment by special act of charters passed prior to 1871. In *Attorney General v. Superior & St. Croix Railroad Company*, 93 Wis. 604, the Attorney General of Wisconsin unsuccessfully applied to the Supreme Court of the State for an information in the nature of *quo warranto* challenging the right of the Superior & St. Croix Company to exercise the franchises conferred by the amendatory act of 1895.

We refer the court to the opinion of the Secretary

in this case citing opinions of Attorney General Harmon and Attorney General Moody holding the *Railway Company* to be lawful successor of the *Railroad Company*. (Transcript pp. 34, 35.)

3. The lands were not exempt from the Northern Pacific's selections because of the Lake Superior and Mississippi grant, or of anything done under it.

(a) There is nothing in the suggestion that the proviso in section 3 of the Northern Pacific act, which deducted from the grant to that company any lands theretofore granted by the United States to another railroad "as far as the routes are upon the same general line," operated to *deduct* from the lands granted to the Northern Pacific the lands within the conflicting limits of its grant and that of the Lake Superior and Mississippi Company. This for the good and sufficient reason that the two grants are not upon the same general route. One grant extended from St. Paul to the head of Lake Superior, approximately and substantially north and south. The other grant extended from Lake Superior to Puget Sound, approximately and substantially east and west. Whilst the two grants did not cross each other at perfect right angles, they did so approximately, as shown by the diagram printed opposite page 43, transcript. *Doherty v. Northern Pacific Ry. Co.*, 177 U. S. 421; *United States v. Northern Pacific Railroad Co.*, 177 U. S. 435.

(b) It therefore follows that the lands used as a basis of loss for the selection in question were within the place limits of the Northern Pacific grant. They were not within the place limits of the Lake Superior and Mississippi grant, but only within its limits of indemnity. Nor were they within the order of with-

drawal of May 26, 1864, made under that grant (which distinguishes this case from *Northern Lumber Company v. O'Brien*, 204 U. S. 190, and *Northern Pacific Railroad Company v. Musser-Sauntry L. L. & Mfg. Co.*, 168 U. S. 604). It is true that the base land was conveyed by the United States under the grant of May 5, 1864. But it *did not pass by that grant.* It passed because it fell within its indemnity limits, and was selected as indemnity *after the date of the Northern Pacific grant and prior to the definite location of that road.* Being lost therefore to the Northern Pacific grant, not before its passage, but after, it clearly formed the basis for a second indemnity selection (see opinion of Secretary, Transcript pp. 35, 36).

4. A good and sufficient answer to all criticisms upon the form or regularity of the selection list is, that the selections were by the terms of the act to be made subject to the approval of the Secretary of the Interior, and he has approved them.

But it may be suggested as a limitation upon the right of selection (a) that the selection must be made on the side of the railroad where the loss occurred.

From the beginning no such limitation under the Northern Pacific grant has ever been suggested by any Commissioner of the General Land Office or by any Secretary of the Interior. That the land department rules the other way and holds that selections under the Northern Pacific act are not thus limited is sufficiently indicated in its decisions set forth as exhibits in the record.

Neither is the limitation warranted by the language of the indemnity clause in question, which is:

> "And whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

No qualification being imposed by Congress as to the side of the road upon which selection may be made, no such qualification can be inserted in the act by judicial legislation.

Counsel refers to the case of *United States v. Burlington and Missouri River Railroad Company*, 4 Dillon 297, affirmed 98 U. S. 334, as establishing that under the Northern Pacific grant selections of indemnity are confined to that side of the railroad on which the loss occurs. But an examination of those decisions shows that they are based on a peculiarity of the grant there considered. That grant did not provide indemnity and the decisions cited did not relate to indemnity but to *granted* lands. Section 19 of the Burlington and Missouri act, considered in the decisions cited, grants to that company every alternate section (except those reserved) designated by odd numbers *to the amount of ten sections per mile on each side of said road*. The opinion of Mr. Justice Miller was that this language conferred no right to take more on either side of the road than what amounted to ten sections per mile on that side, and that, if for any reason the required number of sections could not be found on one side, it was a loss for which indemnity was not provided in the act; that there existed therefore no power in the land department to issue patents for lands lying on the

north side in lieu of lands deficient on the south side. This court said as to this that the grant contemplated one-half of the land to be taken on each side of the road and that the department could not enlarge the quantity on one side to make up the deficiency on the other. This case has therefore no bearing upon the question at issue.

The case of *Southern Pacific Railroad Company v. Smith*, 74 Fed. Rep. 588, seems to be like this and we submit that it was decided erroneously. It is contrary to the plain language of the act, as we have shown, and contrary to the unvarying ruling of the land department. We are advised moreover that the Circuit Court granted a rehearing in that case and ordered defendants to show cause why the decision should not be reversed; that no ruling was ever made upon this order to show cause because the case ceased to be important, the lands having been ascertained to fall within the conflicting grant of the Atlantic and Pacific Company.

(b) There is nothing in the suggestion, should it be made, that no selections can be made from the second indemnity limits until it is shown that the lands within the first indemnity limits along the entire line from Lake Superior to Puget Sound are exhausted.

Such a contention is flatly contradictory of the terms of the joint resolution of 1870, establishing the second indemnity limits. If the first three lines of that resolution had been framed with the specific intention to make such an assertion impossible they could not have been more efficiently worded. The resolution means precisely what it says, that the right to second indemnity lands shall arise whenever, at the time of final

location of the road, there is not *in any state or territory,* within the limits prescribed by the original charter, the amount of lands per mile granted to the company by Congress. The material part of the joint resolution reads as follows:

> "And in the event of there not being in any state or territory in which said main line or branch line may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road beyond the limits prescribed in said charter, as will make up such deficiency on said main line or branch, except mineral and other lands, as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, subsequent to the passage of the act of July two, eighteen hundred and sixty-four."

That the first indemnity limits in Minnesota were deficient to furnish selections to make the losses good involved in the Hoyt and Campbell cases was necessarily adjudicated by the Secretary when he approved the selections and issued the patents. Upon settled rules we can say that his decision of this question of fact is conclusive.

5. It may be urged in the Hoyt case that the act of Congress of July 1, 1898 (30 Stat. 620), operates to give the plaintiff Hoyt the land in his suit and to compel the Railway Company to select elsewhere. Notwithstanding the statement of the Circuit Court

of Appeals in the Campbell case, it seems clear that this question cannot be raised in that case; nor do we understand that Campbell's counsel so contends. Campbell, having no entry of record against the land, falls clearly outside the law in question and the act need only be considered with reference to the case of Hoyt.

The material provisions of the act are:

> "That where, *prior to January first, eighteen hundred and ninety-eight*, the whole or any part of an odd-numbered section, in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been *purchased* directly from the United States *or settled upon* or *claimed in good faith by any qualified settler* under color of title or claim of right under any law of the United States or any ruling of the interior department, and where purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, or not occupied by settlers at the time of such selection, situated within any State or Territory into which such railroad grant extends, and patents shall issue for the land so selected as though it had been originally granted; but all selections of unsurveyed lands shall be of odd-numbered sections, to be identified by the survey when made, and patent therefor shall issue to and in the name of the corporation surrendering the lands before mentioned, and such patents shall not issue until after the survey; *Provided however*, That the Secretary of the Interior shall

from time to time ascertain and, as soon as conveniently may be done, cause to be prepared and delivered to the said railroad grantee or its successor in interest a list or lists of the several tracts which have been *purchased or settled upon or occupied as aforesaid, and are now claimed by said purchasers or occupants*, their heirs or assigns, according to the smallest government subdivisions. And all right, title, and interest of the said railroad grantee or its successor in interest in and to any of such tracts, which the said railroad grantee or its successor in interest may relinquish hereunder shall revert to the United States, and such tracts shall be treated, under the laws thereof, in the same manner as if no rights thereto had ever vested in the said railroad grantee, and all qualified persons who *have occupied and may be on said lands* as herein provided, *or who have purchased said lands in good faith as aforesaid*, their heirs and assigns, shall be permitted to prove their titles to said lands according to law, as if said grant had never been made; and upon such relinquishment said Northern Pacific Railroad Company or its lawful successor in interest may proceed to select, in the manner hereinbefore provided, lands in lieu of those relinquished, and patents shall issue therefor: *Provided further*, That the railroad grantee or its successor in interest shall accept the said list or lists so to be made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but it shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron, or coal: *And provided further*, That whenever any qualified settler shall in good faith make settlement in pursuance of existing law upon any odd-numbered sections of unsurveyed public lands within the said railroad grant to which the right of such railroad grantee or its successor in interest has attached, then upon proof

thereof satisfactory to the Secrtary of the Interior, and a due relinquishment of the prior railroad right, other lands may be selected in lieu thereof by said railroad grantee or its successor in interest, as hereinbefore provided, and patents shall issue therefor: *And provided further*, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this Act, and nothing in this Act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted: *And provided further, That all qualified settlers*, their heirs or assigns, who, prior to January first, eighteen hundred and ninety-eight, *purchased or settled upon or claimed in good faith*, under color of title or claim of right under any law of the United States or any ruling of the Interior Department, any part of an odd-numbered section in either the granted or indemnity limits of the land grant to the Northern Pacific Railroad Company to which the right of such grantee or its lawful successor is claimed to have attached by definite location or selection, may in lieu thereof transfer their claims to an equal quantity of public lands surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, or not occupied by a settler at the time of such entry, situated in any State or Territory into

> which such railroad grant extends, and make proof therefor as in other cases provided; and in making such proof, credit shall be given for the period of their *bona fide* residence and amount of their improvements upon their respective claims in the said granted or indemnity limits of the land grant to the said Northern Pacific Railroad Company the same as if made upon the tract to which the transfer is made; and before the Secretary of the Interior shall cause to be prepared and delivered to said railroad grantee or its successor in interest any list or lists of the several tracts which have been purchased or settled upon or occupied as hereinbefore provided, he shall notify the purchaser, settler, or claimant, his heirs or assigns, claiming against said railroad company, of his right to transfer his entry or claim, as herein provided, and shall give him or them option to take lieu lands for those claimed by him or them or hold his claim and allow the said railroad company to do so under the terms of this Act."

The purpose of the act is obvious—to furnish a means of adjustment of controversies between the Northern Pacific and the settlers within its grant. The cry for its passage came from homesteaders and preemptors who had gone onto lands under various rulings of the department, which had been overruled in the courts, or were there being challenged. The settler in danger of being dispossessed was alone in the mind of Congress. The government has ever been tender of settlers upon the public lands, and the law would never have been passed to protect the timber or stone speculator.

The purpose of the law was to protect those who would be subjected to real loss and hardship if the claim of title of the railroad company should be sustained. Settlers under the homestead law, or under

any other settlement law, would fall in that category. Not only would their improvements be lost, but their time of residence could not be credited to them upon entry of other lands. This was felt to be a real hardship. But a cash purchaser under the timber and stone law could by the failure of his purchase suffer no loss, except a loss of expected profits. His money would be repaid by the government. And so far as a mere applicant to purchase is concerned, he could suffer no loss of any sort. The equities of such purchasers and applicants under the timber and stone law could never have moved Congress to pass the act of 1898, and should not now move the land department and courts to any special effort to extend the act so as to include them.

The language of the act requires, first, that the right of the settler should have attached "prior to January first, eighteen hundred and ninety-eight," thus excluding conflicts created after that date. It is restricted carefully to lands, prior to the date named, "purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right," etc. The last proviso allows "settlers, their heirs or assigns," to transfer their claims to other lands "not valuable for stone, iron or coal."

This statute should be construed not only with due regard to all the language therein contained, but in connection with prior similar legislation, namely, the acts of 1874 and 1890, which were acts for the relief of settlers only. The first clause of the act of 1898 may be read in two ways, depending on whether the words, "by any qualified settler," relate to and qualify

the entire preceding clause, "has been purchased directly from the United States or settled upon or claimed in good faith," or whether they relate to and qualify only the words, "settled upon or claimed." The former interpretation is by far the more reasonable. The word "purchase" is used with reference to a purchase by a settler, and the distinction drawn, between lands purchased and lands settled upon or claimed, was simply to make it clear that the act was intended to apply equally, whether the settler's rights had been consummated by purchase, or only initiated by settlement or claim.

Any doubt upon this subject seems to be put at rest by the susequent provisions of the act. The last proviso clearly applies only to qualified settlers who purchased or settled in good faith. This clause is as free from ambiguity as language can be, and should settle whatever doubt arises from the loose construction of the first clause.

This interpretation is much strengthened by the fact that the timber and stone act is limited to lands valuable for timber or stone and unfit for cultivation. The act of 1898, in permitting the transfer of settlers' claims, provides that lands valuable for stone shall not be so taken. This proviso is manifestly inconsistent with the view that the act was intended to cover timber and stone entries.

If our construction is not correct, the result is that the act of 1898, by being extended to lands acquired under the timber and stone law, is in direct conflict with the settled policy of land legislation. Such a construction permits a cash purchaser under the timber and stone law to take in lieu thereof agricultural lands

without any settlement. The policy of disposing of agricultural lands for cash without residence and qualification was terminated by the repeal of the pre-emption law in 1891.

It should not be supposed by the court that the eastern terminal controversy played the slightest part in the passage of the act of 1898. It is demonstrable that that act was in fact passed for the relief of settlers, and without any reference to that controversy. There were substantially no controversies in the country involved in the eastern terminal question when the act of 1898 was passed. The decision of the supreme court of Wisconsin, which was the first concerning the eastern terminus, was made June 23, 1898, and the provision of the sundry civil bill under discussion was introduced as an amendment by Senator Wilson, of Washington, in March, 1898. All the lands of the Northern Pacific Railroad Company in Minnesota were at that time in the hands of receivers. The act was passed to assist settlers in the state of Washington, and some other settlers upon agricultural lands, whose settlements were jeopardized by the decision in *McHenry v. Nygaard*, 72 Minn. 2, decided April 22, 1898.

However, it is not necessary to determine whether *purchasers* under the timber and stone law are included in the act of 1898. It is sufficient for this case to point out that Jones, under whom Hoyt claims title, had only filed an application for the land before the first of January, 1898, and paid his money and filed proofs December 10, 1898, with full notice of the railway company's rights, and under a receipt subordinating his entry to those rights. No vested right and no inchoate right had been acquired by Jones before the

date fixed by the act of 1898. His application initiated no right as against the government, and prior to his final proof and payment the Secretary might suspend the land from sale and disposition under the public land laws. This is precisely what was done in this case. The tract was withdrawn from entry by the order of February 28, 1898, and the payment of Jones was allowed under a receipt expressly stipulating that such payment was subject to any claim of the railway company. The decisions of the department in the case of Jones, attached to the bill of complaint as exhibit "B" (Transcript pp. 33-41), and in the case of *Eaton v. Northern Pacific Ry. Co.*, 33 L. D. 426, leave little to be said.

It is hardly necessary to refer to the numerous decisions of this court in which it has been held, that where a statute is of doubtful meaning the settled interpretation of the land department will be followed by the court. *Hewitt v. Schultz*, 180 U. S. 139.

6. In conclusion, let us remind the court that the defendants have purchased in good faith from the patentee of the United States. The patent is not one issued inadvertently, and no suggestion is made of any fraud in obtaining it. Every fact and every question of law preliminary to its issue were fully argued upon both sides, and carefully considered by the Commissioner of the general land office, and by the Secretary of the Interior. Both of those officers have decided every question in the case against the entrymen. The rule in such cases is well settled by a long line of decisions that the department's decision is

conclusive as to the facts and cogent as to the law. It can only be overruled for a mistake of law, and the mistake must be clear. *Smelting Company v. Kemp*, 104 U. S. 636, 646; *Maxwell Land-Grant Case*, 121 U. S. 325, 379; *Barden v. Northern Pacific Railroad Co.*, 154 U. S. 288, 325-331.

CHARLES W. BUNN.

FILED.
JAN 25 1910
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 954.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Appellants,

vs.

HERBERT H. HOYT, Appellee.

Appellee's Brief

H. H. HOYT,
Counsel and Solicitor for Appellee.

MILLAR PRINTING CO.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1909.

No. 195.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Appellants,

vs.

HERBERT H. HOYT, Appellee.

BRIEF OF HERBERT H. HOYT, APPELLEE.

It is with great deference that I appear in this Court to present for your consideration the claim of the appellee to the land involved in this action. Notwithstanding all these adverse conditions I propose to contend that the equitable title to this land is in the appellee. I shall endeavor to make my argument as brief as I can, and weary the Court with unnecessary matters as little as possible. I consider it my duty, however, to speak freely about the case itself. In this I must not be understood as reflecting upon the parties defendants or their counsel. Men have

different notions of right and wrong; doubtless the conduct of my opponents square equally with their own ideas of propriety.

THE CHARTER OF THE NORTHERN PACIFIC RAILROAD COMPANY.

It would be difficult for the Court to understand the issues involved in this case without a knowledge of the facts surrounding them. The Northern Pacific Railroad Company was incorporated by an act of Congress, approved July 2, 1864 (13 Stat. at L. 365). Among other things it was authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the 45 degree of latitude to some point on Puget Sound, * * * and it was by the act vested with all the powers, privileges and immunities necessary to carry into effect the purposes as therein set forth.

The capital stock of said company was to consist of one million shares of one hundred dollars each, which were in all respects to be deemed personal property, and transferred in such manner as the by-laws of said corporation shall provide.

The incorporators under this act were 134 politicians scattered among 24 States and Territories.

By Section 3, it was enacted:

"That there be and hereby is granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, *on each side of said railroad line*, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile *on each side of said railroad* whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. *Provided, That if said route shall be found upon the line of any other railroad to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes*

are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

At the date of this act, the States through which the Northern Pacific Railroad Company would construct said railroad were the States of Wisconsin, Minnesota and Oregon, and the Territories would be North Dakota, Montana and Washington. Through the states, including the indemnity limits, there would be a strip of land eighty miles in width, and in the Territories said strip would be one hundred and twenty miles in width; the grant would include the alternate odd sections within said area the whole length of the road, to-wit: 2220 miles; equal to an area of 78,000 square miles of the public domain, and with the two indemnity limits added, the amount set apart by the government to aid in the construction of the Northern Pacific Railroad, would be about 102,000 square miles of the public domain.

The act of July 2, 1864, and the joint resolution of May 31, 1870, contemplated that only the lands within the place limits were granted, but it gave to the railroad company the right to select in lieu of lands lost from the place limits, lands within the two indemnity limits of said railroad. The Northern Pacific Railroad Company apparently knew no difference between the lands within the place, and lands within the indemnity limits, and disposed of the same when opportunity presented without regard to the distinction. If the lands were within the indemnity limits and the Northern Pacific Railorad Company sold the same and for any reason the title failed, the purchaser of said land could acquire the title to the same by purchase under the act of Congress approved March 3, 1887, and the Northern Pacific Railorad would relinquish its claim to such land, and select other lands in lieu thereof.

By Section 10 of said act, it was provided:

"That all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription; and *no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the Congress of the United States.*"

The theory of the organization of the Northern Pacific Railroad Company under the act of Congress of July 2, 1864, was that the stockholders of said road should always be in control of the affairs of the company, and that no mortgage or lien of any kind should be placed upon the railroad; that the enormous amount of land granted would be sufficient to construct the railroad, and after it was built the road would be owned and conducted by, and for the benefit of the stockholders, we shall see hereafter how the intention of Congress in this particular was afterwards made of no effect.

To provide for the completion of this railroad within a reasonable time, Congress by Section 19, of said act provided:

"That unless said Northern Pacific Railroad Company shall obtain bona fide subscriptions to the stock of said Company to the amount of two million dollars, with ten per centum paid in within two years after the passage and approval of this act, it shall be null and void."

Congress by Section 20 of said act further enacted:

"That the better to accomplish the object of this act, namely, to promote the public interest and welfare

by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in times of war) the use and benefit of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act."

The Northern Pacific Railroad Company accepted the provisions of this act, and it was under the power thus conferred, that the Northern Pacific Railroad Company was authorized to act. It was an agreement between the United States on the one part, and the Northern Pacific Railroad Company on the other. Neither party to the contract was authorized to bind the other by doing any act outside of the provisions of the charter, the charter was the measure of its power, and without the mutual consent of both parties, no material change in its terms could be made.

By Section 8 of said act it was enacted:

"That each and every grant, right and privilege herein are made and given to, and accepted by, said Northern Pacific Railroad Company, is upon, and subject to, the following conditions, namely: That the said Company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than 50 miles per year after the second year, and shall construct, equip, furnish and complete the whole road by the 4th of July, 1876."

It was found by those in control of the affairs of the Northern Pacific Railroad Company at that time, that

the Company was not financially in condition to commence the construction of said road, and as it was prohibited by Section 10 of its charter, to execute a mortgage or lien in any way upon the railroad and the lands granted to it, the company applied to Congress for consent to mortgage its prospective holdings for the purpose of securing bonds to be issued in the construction of its road, and Congress on May 31, 1870, passed (16 Stat. at L. 378) a joint resolution, the material part of which is as follows:

> "That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by *mortgage* on its property and rights of property of all kinds and descriptions, real, personal and mixed, including its franchise as a corporation; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of land per mile granted by Congress to said Company, within the limits prescribed by its charter, then said Company shall be entitled, under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States designated by odd numbers, in such State or Territory, within ten miles on each side of said road beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July 2, 1864, * * * and if the *mortgage* hereby authorized shall at any

time be enforced by foreclosure or other legal proceedings or the mortgage lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after, not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder."

It will be noticed from the reading of this resolution, that in the event of default made in any of the conditions of the mortgage, resulting in its foreclosure, specific directions were given as to the manner the sale of the lands covered by said mortgage should be conducted, this was a statutory requirement that must be complied with in order to divest the title by proceedings under the sale. It will also be noticed that the resolution speaks of a mortgage, not mortgages.

It will be noticed also that under this joint resolution there was no authority conferred upon the railroad company to incur any obligation, that might thereafter become a lien on the property of the company. It also appears that whatever rights the Northern Pacific Railroad Company might have to lands within the second indemnity limits of said grant, such rights were cofnerred upon it by this joint resolution; it was not, however, an absolute right, but could only be obtained "in the event of there not being in any State or Territory in which said main line or branch may be located at the time of the final location thereof, the amount of land per mile granted by Congress to said Company within the limits prescribed by its charter (when these facts appeared), "the said Company shall

be entitled, under the direction of the Secretary of the Interior to receive so many sections of land belonging to the United States, &c."

It would appear from this resolution that it was the intention of Congress by its adoption, that before any second indemnity limits could be legally established the land department should examine and determine whether within any State or Territory through which the road was to pass there was any deficiency requiring another indemnity limit; there should be some record evidence of that fact without which the land department would have no authority to establish such limits, the records in this case show no such determination and in fact no action of this kind was ever taken.

THE JAY COOKE MORTGAGE DATED JULY 1, 1870, AND THE EVENTS TRANSPIRING UNDER THE SAME.

Under the Joint Resolution approved May 31, 1870, the Northern Pacific Railroad Company, July 1, 1870, mortgaged to Jay Cooke and John Edgar Thomson, as trustees, all its rights, liberties, franchises and property, including its land grant and railroad, to secure an issue of its bonds not exceeding fifty thousand dollars per mile for the whole length of its railroad and branches then authorized by acts of Congress. The length of the road was then estimated to be about 2,500 miles. These bonds were payable in gold at the end of thirty years from their date, with interest coupons, payable also in gold, semi-annually, at the rate of seven and three-tenths per cent per annum. At the

date of this mortgage, the Northern Pacific Railroad Company did not own a single acre of land within the congressional grant of July 2, 1864, neither had any general route of said railroad been established, nor had any efforts been made towards the construction of said railroad. The mortgage given covered only lands belonging to the United States, the amount secured by this mortgage, to-wit: $50,000 per mile of road was amply sufficient to construct and equip the Northern Pacific Railroad from Lake Superior to Puget Sound. Under the provisions of the act of July 2, 1864, the Company was not to pay anything for right-of-way over government lands or for grounds upon which to build depots and other necessary structures, any ties, stone or earth required to be used in the construction of said road, when found upon the public domain were freely given to the railroad by the Government of the United States. Nature had seemingly graded the whole road from Lake Superior to the Rocky Mountains. It was nearly a dead level plain the whole way. There was no heavy grading to be done, no deep cuts to be made, no expensive fillings or costly bridges to construct, no right-of-way to be bought, no grounds for station houses, water tanks or other structure to be purchased, no stone, timber or ties to be paid for, all of these were made a free gift from the government. This road under these circumstances could have been constructed and equipped at a cost not exceeding $15,000 per mile.

On August 13, 1870, the Northern Pacific Railroad Company filed its map of the general route of its road with the commissioner, which map was accepted by the land department. The eastern terminus of said road, according to said map, was at the mouth of Montreal river, the boundary line between the States of Wisconsin and Michigan, from

thence it ran in a westerly direction to Walla-Walla in the State of Washington; after the filing of the map of general route the Secretary of the Interior ordered a withdrawal of lands embraced within the limits of the general route as shown by the map of said route on file in the office of the Commissioner of the General Land Office, and also withdrew lands within the first and second indemnity limits of said railroad. In other words there was withdrawn by order of the land department a strip of land 80 miles in width in the states and 120 miles in width through the territories. These orders of withdrawal remain unrevoked to this day. The line of the general route and of definite location of said road passed through Section One in Tp. 48 N, R. 17 W., in the State of Minnesota, that point being known as Thomson's Junction, at which place it intersects the Lake Superior and Mississippi Railroad Company, that company being the beneficiary of the State of Minnesota under an act of Congress dated May 5, 1864. The State of Minnesota having been granted lands to aid in the construction of a railroad from St. Paul to Lake Superior. The Northern Pacific Railroad Company began the construction of its road in 1871, at the intersection of the Lake Superior & Mississippi Railroad Company in Section 1, Tp. 48 N., R. 17 W., and continued westerly on its line of definite location to the Missouri river, a distance of about four hundred miles. On January 1, 1874, it made default in the payment of the interest on its bond issued under the Jay Cooke mortgage, amounting in the aggregate to $30,735,600, and the road was placed in the hands of a receiver and the trustees of said mortgage commenced an action in the Circuit Court of the United States for the Southern District of New York to foreclose said mortgage. Subsequently, a plan of reorganization of the financial af-

fairs of the Northern Pacific Railroad Company was proposed and adopted, by which the capital stock of the company was to remain as fixed in the act of July 2, 1864, but was to be divided into preferred and common stock. The amount of preferred stock was fixed at 51,000 shares and the amount of the common stock at 49,000 shares. It was proposed to use the amount received for the preferred stock to take up the $30,735,600 bonds outstanding and for every $1,000 of these outsanding bonds, it proposed to give the holder of the same, preferred stock to the amount of $1,400. This would take 43,000 shares of preferred stock to purchase the $30,735,600 in bonds. The remainder of the preferred stock ($9,000,000) was to be used to retire outstanding land warrants, bonds to pay the floating debt of the company and generally for the purpose of carrying into effect the plan of reorganization, it appears that thereafter $15,790,653 of said preferred stock had been under said plan of reorganization converted into lands in the State of Minnesota and Dakota, east of the Missouri river, leaving still outstanding $35,209,346 of preferred stock in possession of the stockholders of said company. The lands acuired under the grant to the Northern Pacific Railroad Company in the State of Minnesota, and Dakota, east of the Missouri river, amounted in the aggregate to 8,115,198 acres.

The preferred stock under this plan was to have all the rights and privileges of the common stock, together with the right to vote and the holders thereof would be entitled to dividends in each calendar year, not exceeding 8 per cent per annum of the net earnings, before any dividend would be paid on the common stock. By this plan it was agreed that the preferred stock might be convertible at par value into lands belonging to the company east of

Missouri river in the State of Minnesota and North Dakota. Common stock was to be issued to the amount authorized by the charter less the amount of 51,009 shares of preferred stock. The common stock was to have no voice i nthe management of the affairs of the company until 1878 and was to receive no dividends on such stock until there was a surplus after the dividends were paid on the preferred stock. It will be seen from the above statement that the Northern Pacific Railroad Company with all of its property, including its grant of land, was taken from its stockholders, and turned over to its bond holders, this was contrary to the intention of the act of Congress of July 2, 1864. It appears that the cost of the construction of this four hundred miles of road from Thomson Junction to Missouri river exceeded the sum of $100,000 per mile of road. It also appears that after the acceptance of this plan of reorganization, the property and effects belonging to the Northern Pacific Railroad Company was placed in possession of the preferred stockholders, that at that time all the indebtedness of said company was supposed to be liquidated, and such indebtedness as was not paid was represented in the stock of said road. Those that controlled the affairs of said company from 1871 to 1874, less than three years, had expended about one hundred millions of dollars of the company's funds for which the assets appearing were 400 miles of railroad, and eight million acres of land.

By the consummation of this plan of reorganization, the financial affairs of the Northern Pacific Railroad Company were wholly rearranged substantially all of its indebtedness, existing at the time of the adoption of the plan, was cancelled, its capital stock outstanding at that time was surrendered, and the preferred and common stock provided for. It was a realjustment of its financial affairs under

and within the original act of incorporation, and without the sanction of any additional legislation by Congress, the preferred stockholders were placed in control of the company which, with the subsequent bondholders, have since managed to shape the policy of the railroad although holding but a small majority of the stock.

THE NORTHERN PACIFIC RAILROAD COMPANY AFTER ITS FIRST RE-ORGANIZATION.

After the re-oroganization of the Northern Pacific in 1875, said corporation was free from debt, except to its stockholders. It had four hundred miles of completed road, and had earned 8,000,000 acres of land.

Section 10 of the act of Congress, approved July 2, 1864, prohibited the Northern Pacific Railroad Company from giving any mortgage or construction bonds on said road or mortgage or lien made in any way, except by the consent of the Congress of the United States. "The Joint Resolution approved May 31, 1870, provided:

> "That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road and to secure the same by mortgage on its property and rights of property, & c."

This resolution was passed prior to any act performed by the Northern Pacific Railroad Company looking towards the construction of said road. And under this resolution a mortgage was given covering the entire road from Montreal river to Puget Sound, securing the payment of

bonds not to exceed $50,000 per mile for the whole length of the road, and as it appears there was issued $30,725,600 bonds under this mortgage prior to January 1, 1874. The authority under the Joint Resolution of May 31, 1870, was restricted. The bonds could only be issued for the purpose of constructing and equipping said road. The mortgage was given July 1, 1870, and the bonds were issued, secured by its provisions and four hundred miles of the road had been constructed and equipped from the proceeds thereof, prior to January 1, 1874. The complainant is advised and will insist that the power given to the Northern Pacific Railroad Company to issue its bonds and to secure the same by mortgage conferred upon the company by the Joint Resolution of May 31, 1870, was a charter power, that power was exhausted when the former mortgage was executed and bonds issued thereunder, that any subsequent mortgage that might be given by the company would be without effect and absolutely void.

A simliar case to this was that of the East Tennessee, Virginia & Georgia Railway Company vs. Frasier et al., 169 U. S. 196 (L. ed.), in which Mr. Justice Brewer, speaking for the court, declared that where permission was given in the charter of a railroad to borrow money on the credit of the company and secure the same by a mortage of its charter and works, it was a charter power and this special right to mortgage when once exercised was exhausted and in respect to future contracts and rights was as though said charter power had never been granted. The rights to issue bonds under the Joint Resolution, and secure the same by mortgage, was restricted to the construction and equipment of said road. It appears that the Northern Pacific Railroad Company had under this provision given its mort-

gage July 1, 1870, on the whole length of its road to secure the payment of bonds to the amount of $50,000 per mile of road, and had under that mortgage issued more than $30,000,000 of its bonds and had constructed four hundred miles of its road, after which and on January 1, 1874, the Northern Pacific Railroad Company went into the hands of a receiver, it was subsequently re-organifed and the Northern Pacific Railroad Company turned over to its stockholders who operated the road up to January 1, 1881, when another mortgage was given, eight years had elapsed since this charter power was exercised and exhausted, and we insist under this statement that there was no authority to execute any other mortgage under the provisions of the Joint Resolution of May 31, 1870.

It appears, however, that the Northern Pacific Railroad Company executed and delivered to the Central Trust Company of New York its so-called General First Mortgage, dated January 1, 1881, to secure an issue of bonds not exceeding $25,000 per mile of road, which mortgage covered the entire length of road and this mortgage covered the constructed as well as the unconstructed portion of the road. Its land grant was also included in this mortgage as well as the four hundred miles of road that had been constructed, equipped and in operation eight years prior to the date of said mortgage; under Sec. 10 of the act of July 2, 1864, and Joint Resolution of May 31, 1870, this mortgage was certainly inoperative and void. This mortgage, however, was not foreclosed and was subsequently discharged, but the amount found due on said mortgage in the final accounting was added to the sum which was found due from the Northern Pacific Railroad Company and this property sold under the sequestration proceedings, and the pretended sale of the property east of the Missouri river,

was made to satisfy the amount. The Northern Pacific Railroad Company executed and delivered to the Farmers Loan & Trust Company three other mortages dated respectively November 20, 1883, December 1, 1887, and December 2, 1889, in each of these three mortgages the lands east of the Missouri river was expressly excepted, and was not covered by these later mortgages.

On August 15, 1893, The Farmers' Loan & Trust Company of New York et al., filed its bill of complaint against the Northern Pacific Railroad Company in the Circuit Court of the United States for the Eastern District of Wisconsin, answer to said bill was filed and receivers were appointed the same day. The receivers took possession of the property of said company, ancillary proceedings on this complaint were taken in the State of Minnesota, and other districts in the several states through which the road ran or in which the Northern Pacific Railroad Company was interested in some thirty different railroads which branched off from the main line of said railroad between Lake Superior and Puget Sound, and it was connected with other corporations, making in number about 50, that all of these separate corporations formed what was called the Northern Pacific Railroad Company system, and it was insisted in said bill that it was necessary to maitnain and preserve this system and the only way it could be done was to place the property in the custody of the court.

On October 18, 1893, a bill of complaint was filed in the Circuit Court of the United States for the Eastern District of Wisconsin by the Farmers' Loan & Trust Company of New York, against the Northern Pacific Railroad Company and others, defendants, the purpose of which was the foreclosure of the several mortgages given by the Company to the complainant, answer was filed by the defend-

ants in which the facts of the bill were admitted and the court appointed the same persons receivers in this case as were appointed in the former case.

To show the object to be sought by the filing of these separate complaints, a portion of the matters sworn to in the respective bills are here placed in parallel columns.

AUGUST 15, 1893.	FORECLOSURE CASE FILED OCT. 18, 1883.
That said property may be shielded and preserved as a valuable single trust property by adequate judicial protection and the sums due and to become due to the defendants, bondholders and creditors secured and ultimately paid in full; but your orator avers that unless such a course is pursued, to-wit: the taking of the property into judicial custody, said property will be dismantled, dissipated and dismembered and vast sums of money will be lost to the various creditors and stockholders of said Company. And your orator avers that the unity of the property and its integrity as a whole, as now held and operated, constitute one of the most important elements of its value and that to permit its severance will result in ruinous sacrifice of every interest in said property.	In consequence of the embarrassed conditions of the financial affairs of the mortgagor company, and on account of the many difficulties which are manifest upon and from all allegations hereinbefore containtained, involved in the execution of your orators said trusts, it is impossible for your orator, as trustee under the said mortgages, to execute its said trusts, in the way and manner specified and provided in and by the said mortgages without the aid or interposition of this Honorable Court in chancery sitting; *nor can the said trusts be executed, as your orator is advised and charges and the rights of all parties interested be ascertained and fully protected in the premises, otherwise than by a judicial sale of the mortgaged premises, and of all the franchises, property premises and appurtenances covered by the said mortgages.*
That the object sought to be accomplished by the defendant in offering its lands	

for sale to settlers at the extremely low prices hereinbefore stated, namely, the settlement of the country tributary to its railroad and the consequent creation of a large and profitable traffic over its railway system, having been accomplished, the time has arrived when the defendant can wisely adopt a policy of holding its remaining lands for considerably higher prices; *and your orator alleges that if the defendant's said railway system and the land so remaining to it can be taken into judicial custody and preserved and managed as a unit, said remaining lands can be sold from time to time for prices equal to their constantly increasing value, and that the proceeds that will be received from such sales, together with the earnings of the defendant's railway system, will be more than sufficient to pay and discharge all the defendant's obligations to its creditors and preserve for its stockholders said railway system freed from debt. If said lands be not taken into judicial custody by the appointment of receivers, authorized and empowered to preserve the same and said railway as a unit, said lands will be sold*

Until such sale can be had, and the proceeds thereof distributed, your orator is likewise advised and charges that it is expedient and necessary that the franchises, property, premises and appurtenances so mortgaged to your orator in trust as aforesaid and all the rights, franchises and property of the mortgagor company, of whatever name, nature, and description, including all its money on hand, and the earnings of the same, be placed in the hands and under the control of a Receiver or Receivers, to be appointed herein by the court, with such proper powers and control over the same as to it, as the court shall see right and equitable to be conferred.

under decrees and executions at the suits of lien holders at prices far less than their value and will not realize, together with said railway system, a sum anything like sufficient to pay the bonds now outstanding under the several mortgages made by the defendant as aforesaid.

On October 18, 1893, the following appears in the records of the case:

> And it is further ordered, that said cause of P. B. Winston and others against the Northern Pacific Railroad Company be, and the same hereby is, consolidated with this cause, and the orders and proceedings had therein are hereby made the orders and proceedings in this cause; the consolidated cause to proceed under the title of this cause, as above recited and set forth.

On November 15, 1893, the following order was made:

CIRCUIT COURT OF THE UNITED STATES FOR THE EIGHTH JUDICIAL CIRCUIT, DISTRICT OF MINNESOTA, THIRD DIVISION.

P. B. Winston, The Farmer's Loan & Trust Company of the City of New York, a Corporation, William C. Sheldon, George R. Sheldon, William S. P. Prentiss, and William C. Sheldon, Jr., co-partners doing business under the firm name and style of William C. Sheldon & Company,

Complainants,

vs.

Northern Pacific Railroad Company, Defendant.

Comes the above named complainants by James E. Markham, their solicitor, and the intervening petitioners Frank A. Seymour, Theodore Borup, Maurice Auerbach and Jasper Tarbox, by their solicitor H. F. Stevens, also the intervening petitioner J. E. Blake by Davis, Kellogg & Severance and Munn, Boyeson and Thygeson his solicitors, and the intervening petitioner Andrew Mortenson by Davis, Kellogg & Severance, W. S. McClenehan, W. A. Fleming and Munn, Boyeson and Thygeson, his solicitors, and the motion of said intervening petitioners to discharge the receivers heretofore appointed in this case by this court, to dismiss the bill; came on to be heard and the court being now well and sufficiently advised in the premises finds that the order of the court appointing receivers upon the

said bill filed in this cause was improvidently made and that said bill of complaint does not state a cause of equitable cognizance. It is therefore ordered, adjudged and decreed that the receivers, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, heretofore appointed in this cause be and they are hereby discharged as such receivers and the bill of complaint is hereby dismissed. And it appearing to the Court that in a case numbered 645 C. Equity pending in this court, to-wit: Farmers Loan & Trust Company, Complainant, vs. Northern Pacific Railroad Company, Philip B. Winston, George R. Sheldon, William C. Sheldon, William S. P. Prentiss, and William C. Sheldon, Jr., co-partners under the firm name of William C. Sheldon & Company, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, Receivers of the Northern Pacific Railorad Company, defendants, that the said Thomas F. Oakes, Henry C. Payne and Henry C. Rouse have been appointed receivers of the same property placed in their custody and possession by the order of the court in this cause. It is further ordered that said Receivers retain the custody and possession of said property and account therefor as receivers in the said cause numbered 645 C. Equity, to-wit: Farmer's Loan & Trust Company complainants, against Northern Pacific Railroad Company, Philip B. Winston, George R. Sheldon, William C. Sheldon, William S. Prentiss, and William C. Sheldon, Jr., co-partners under the firm name of William C. Sheldon & Company, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, receivers of the Northern Pacific Railroad Com-

pany, defendants, aforesaid, to the court of primary jurisdiction in said last named cause.

Dated this 15th day of November, A. D. 1893.

HENRY C. CALDWELL,
U. S. Circuit Judge.

"Endorsed Order discharging receivers and dismissing case. Filed Nov. 15, 1893, Oscar H. Hillis, Clerk."

It appears that the bill filed August 15, 1893, by the Farmer's Loan & Trust Company of New York, et al, against the Northern Pacific Railroad Company upon which the Receivers were appointed, was filed in collusion between the complainants, and the President of the Northern Pacific Railroad Company, without the knowledge of the directors of the Northern Pacific Railroad Company, and in fraud of their rights, and for this reason, and for other causes, the bill filed in the circuit court of the United States for the District of Minnesota, was dismissed and the Receivers appointed were discharged.

The bill filed October 18, 1893, by the Farmer's Loan and Trust Company against the Northern Pacific Railroad Company to foreclose the three several mortgages above referred to, which ancillary complaints were filed proceeded in the Court of Minnesota, these mortgages did not effect any lands east of the Missouri River. Why jurisdiction of this foreclosure bill was retained in the Circuit Court of the United States for the District of Minnesota is not apparent. However, under this foreclosure, a decree of foreclosure and sale, under decree, which was made April 27, 1896, and sale made July 25 1896. On November 16, 1896, the receivers under the bill filed Oct. 18, 1893, to foreclose

said mortgages, were discharged, and in the order for discharge of the receivers appears the following:

> "But it is not intended by this decree to discharge them as Receivers of the Northern Pacific Railroad Company, appointed by decree entered May 25, 1896, upon a supplemental bill filed in this Court by the Farmer's Loan and Trust Company, Complainants, against the Northern Pacific Company and other defendants, but said Edwin H. McHenry and Frank G. Biglow are discharged as receivers in the consolidated cause in regard to all matters except as to such as are included under their said appointment of May 25, 1896."

The decree made and entered May 25, 1896, (Record 145) was based upon the bill of complaint filed August 15, 1893. It commences:

> This cause came on to be further heard upon the bill of complaint filed herein on August 15, 1893, by the Farmer's Loan & Trust Company, Philip B. Winston, George R. Sheldon, William S. P. Prentiss and William C. Sheldon, Jr., with one William C. Sheldon, since deceased and upon answer of the Northern Pacific Railroad Company thereto filed herein on said day, and upon the supplemental Bill of Complaint filed herein this day, and the answer of the Northern Pacific Railroad Company and the other defendants thereto, and upon the other pleadings and proofs herein and upon all the papers on file, etc.

This is the decree upon which the sale of the lands east of the Missouri River was based, and includes the land in controversy.

We have seen that the bill of complaint filed August 15, 1893, was dismissed by the Circuit Court of the United States for the District of Minnesota, November 15, 1893. How can a supplemental bill in the same cause make the original bill effective? The decree dismissing the bill declares:

> That the order of the Court appointing receivers upon the bill filed in this cause was improvidently made and that said bill of Complaint does not state a cause of equitable cognizance. It is therefore ordered, adjudged and decreed that the receivers Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, herebefore appointed in this cause be, and they are hereby discharged as such receivers and the bill of complaint is hereby dismissed.

The controversy now before the court is over the title of a tract of land within the second indemnity limits of the Northern Pacific Railroad Company, in St. Louis County, State of Minnesota. It is conceded that the lands granted by Congress to said railroad lying within the State of Minnesota, and in the State of North Dakota, east of the Missouri River, were not covered by the mortgages sought to be foreclosed by said foreclosure bill filed October 18, 1893, but were expressly excepted therefrom, and therefore, the receivership under the ancillary foreclosure bill in the Federal Court of Minnesota did not extend to the lands granted in that State, and after the discharge of the receivers, and the dismissal of the bill under which the receivers were appointed, was there any receivers other than under the foreclosure bill?

The dismissal of the bill of complaint filed Aug. 15, 1893, by the Federal Court of Minnesota was a denial by

that Court of the jurisdiction of the United States Circuit Court for the Eastern District of Wisconsin over the land grant in the State of Minnesota. After such dismissal the administration of the land grant in Minnesota by the receivers was without legal authority, or even color of authority. There could be no supplemental bill to this bill that had been dismissed, for such a bill presupposes a bill which had a legal standing in Court at the time the supplemental bill is filed. We therefore insist that the order or decree filed May 25, 1896, called a supplemental bill to the bill filed August 15, 1893, was not authorized, had no legal effect, and the proceedings taken under it were absolutely void.

On April 27, 1899, the Circuit Court of the United States for the Eastern District of Wisconsin, directed the sale of lands lying within the State of Minnesota, and the State of North Dakota, east of the Missouri River, and such lands were to be sold in the manner specified in said order. (Record pp. 145, 149). On June 5, 1899, a decree ancillary to that above mentioned was entered in the United States Circuit Court for the District of Minnesota; this order of sale was based upon the decree of the Court of May 25, 1899, and on July 17, 1899, the lands in controversy were sold by the Special Master, to the Northern Pacific Railway Company. (Record 163).

On September 16, 1899, said sale was confirmed by the court. In such decree of confirmation the following appears:

> "And it appearing by the several reports of said special master, so filed as aforesaid, *that he has fully complied with the directions in said decrees as to the sale of said lands* and rights in respect of lands, and

that such purchaser, the Northern Pacific Railway Company, was the highest and best bidder for said lands, and rights in respect of lands, sold as provided in said decree, and that the same were struck off at the several sales thereof to the said purchaser.

We shall show hereafter that the Court was misinformed by the report of the special master as to the manner in which the sale was made and we shall contend that the sale of this land under these proceedings is absolutely void. First, because the bill filed August 15, 1893, upon which this sale was based was dismissed before the supplemental bill was filed, and that there was no legal authority to make the sale. Second, *that the Special Master disregarded the decree of the Court, which directed specifically the manner in which this land should be sold and that the sale was made without any decree to base it upon.*

It may be contended that many of the statements above mentioned should not be regarded by the Court, for the reason that there is no evidence in the case of the facts therein stated. This may be true. The question, however, is as to the title to a tract of land, and the defendants seek to deraign its title through these proceedings of the court, which resulted in a sale to their grantors. In such a case the law requires the defendants to offer in evidence to sustain their title, the whole enrolled record, at least, all those parts of the record that would have any bearing upon the question whether the proceedings as a whole divested the former owner of its title. Pratt vs. Stewart, 10 Mich. 260. In the case of Thatcher vs. Powell, 6 Wheaton 221, it was decided by the Supreme Court of the United States, that no individual, or public officer, can sell and convey a good title to the lands of another, unless authorized so to do by

express law. This is one of those self-evident propositions (says the court) to which the mind assents without hesitation; a person invested with such power must pursue with *precision* the course prescribed by law, or his acts are invalid. This principle has been repeatedly recognized by the Supreme Court of the United States.

In the case of Ransom vs. Williams, 69 U. S. L. ed) the Court on this subject said:

> "The plaintiff asserted a title, and it was for him to show everything necessary to maintain it. The rule on this subject is thus laid down by Chief Justice Marshall, "It is a general principle that the party that sets up a title must furnish evidence necessary to support it. If the validity of a deed depends upon an action in pais, the party claiming under that deed is as much bound to prove the performance of the *act as he would be bound to prove any matter of record on which its validity might depend.* It forms a part of his title; it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him before he becomes a purchaser, and the evidence of these should be preserved as a necessary muniment of title."

If in the records of the proceedings in the case of the Farmers' Loan & Trust Company and others vs. the Northern Pacific Railroad Company filed in the Court August 15, 1893, it appeared that on November 15, 1893, the Circuit Court of the United States for the District of Minnesota, by a decree of said Court dismissed that bill, that being the basis for the order of sale of this land, upon which this land was sold and the sale confirmed, it would be the duty of the defendants to produce this record. No

proceedings of this kind could have been taken on a bill filed simply to foreclose a mortgage. There was no mortgage on these lands. If this record had been offered in evidence in this case it would show that the Court had no jurisdiction to order a sale of this land.

The right to this land depends upon the act of Congress approved July 2, 1864, and the construction of the Joint Resolution of May 31, 1870, Section 10 of the organic act prohibits the Northern Pacific Railroad Company from ever giving "any mortgage or construction bonds on said road, or mortgages or liens in any way except by the consent of Congress."

The United States had a right to make these conditions. There was no limit as to the time, the completion of the road, would have no effect upon them. If Congress had never given its consent that a mortgage might be made by th Northern Pacific Railroad Company covering the granted lands, could any valid mortgage have been given by the Company? It seems to me that there could be no question that if there had been no consent by Congress, no mortgage or lien made covering the granted lands would have been of any effect.

The acceptance of the provisions of the grant of July 2, 1864, by the Northern Pacific Railroad Company, created a contract between the United States and the Company that could not be changed or modified without the consent of both parties.

No court had a right to abrogate the provisions expressed in Section 10, by awarding a decree against the Company for the satisfaction of a lien created by the Court, and thus indirectly do what the law forbids to be done in a direct manner. The act of July 2, 1864, is the

measure of the powers conferred upon the Northern Pacific Railroad Company; what is there expressed, in clear and plain language, is conferred upon it. What is doubtful is expressly excluded. It is clearly shown in these proceedings that the Northern Pacific Railroad Company in its actions disregarded the charter of its creation and conducted its business as if it owned and possessed this enormous grant in fee without any restrictions as to the manner in which it should be used.

Strangers dealing with a corporation are only bound to look to its charter to ascertain the extent of its corporate powers and privileges and notice to them that the corporation will do some things in violation of its charter or beyond its authority, would be of no effect.

Can it conceived as possible that Congress in the enacting of the provisions expressed in the act of July 2, 1864, had the intention under Section 10, of said act to provide that Congress might thereafter give its consent that a mortgage might be given to secure the issue of bonds for the construction of thirty branch lines to the main line of the Northern Pacific Railroad Company, in order that there might be a Northern Pacific Railroad Company system—the proposition would be absurd. Congress in the creating the provisions of the law which incorporated the Northern Pacific Railroad Company and granting aid in its construction, was only interested in obtaining the construction of a road from Lake Superior to Puget Sound. It had no idea that this enormous grant to this road should stand as security to build up any system that those in control, seeking their own interest, should consider advisable. The charter of said Company, as specified in the act of

July 2, 1864, was the measure of its powers, and no amount of ingenious reasoning can change it. It may be claimed that the road having been constructed, the land embraced within its limit, belonged to the Northern Pacific Railroad Company and that Company had the right to do with said lands as the Northern Pacific Railroad Company seemed meet. This we deny. The charter having been granted to the Northern Pacific Railroad Company by act of Congress, July 2, 1864, under certain conditions, Congress would have the right and it would be its duty to see that all the provisions were not only complied with, but were subsequently observed.

If, however, we concede that after the road was constructed, the Government had no further interest in the same, the lands that were within the indemnity limits of said road, the title to which was in the United States, could not be divested except within the terms of the act of July 2, 1864, by any sale made by the order of any Court.

Prior to the decree on the foreclosure of these mortgages, there appears to have existed a committee of bondholders having under consideration a plan to re-organize the Northern Pacific Railroad Company. On March 16, 1896, said committee submitted to the holders of the bonds, and stocks issued and guaranteed by the Northern Pacific Railroad Company, a statement which was afterwards adopted of which the following is taken:

The property of the Northern Pacific Railroad Company comprises, in various forms of ownership and control, a railway system of 4,706 miles; a land grant of about 43,000,000 acres, and sundry bonds, stocks and accounts representing interest in terminals, express, coal and navi-

gation companies. This property is represented by fifty-four (54) corporations which have issued $380,000,000 of bonds and stocks, of which all are now outstanding and $271,949,044 including defaulted interest to December 31, 1896, are owned directly by the Company. The plan for independent re-organization of the property has been drawn upon the following basis:

The ultimate union of main lines, branches and terminal properties through direct ownership by a single company. The railroads of the Northern Pacific system are composed of main line 2,152, 35-100 miles in length or 45 and 73-100 per cent of the whole; the branch lines are 2,554 9-100 miles in length or 54 and 27-100 per cent of the whole.

The first, second and third mortgage bonds are secured by liens in their respective order upon the land grant and upon the main railroad. The consolidated mortgage bonds are secured by a fourth lien upon the land grant and upon the main line railroad, and also by the pledge of first mortgage bonds upon various branch lines having an aggregate length of 1,145 65-100 miles. The public land grant by the United States to the Northern Pacific Railroad Company, under its charter of July 2, 1864, amounted to 12,800 acres of land to the mile of track in the States of Minnesota and Oregon, and 25,600 acres of land per miles in the intermediate territories. At the discretion of the managers of this plan of re-oroganization, if adopted, all of these various properties belonging to the Northern Pacific Railroad Company, will be sold, under one or more of these several mortgages, in default, and a successor company will be organized.

The new company is to authorize the following securities:

First: Prior lien 100-year 4 per cent gold bonds for $130,000,000. These bonds are to be secured by a mortgage upon the main line, branches, terminals, land grant, equipment and other property, embraced in the re-organization, if carried out, and also upon all other property thereafter acquired by the use of any bonds to be issued under both of the new mortgages.

Second: General lien 150-year 3 per cent gold bonds limited in amount to $60,000,000, in addition to a reserve for the 100-year 4 per cent prior lien mortgage of $130,000,000; total amount of both mortgages, $190,000,000. In addition to this there was to be issued $75,000,000 preferred stock, and $80,000,000 common stock, in shares of $100 each and for the purpose of paying the expenses of re-organization as provided in this plan, $5,000,000.

The capital stock of the Northern Pacific Railroad Company at the date of this proposed plan of re-organization was $84,000,000. In the re-organization the stock of the new company was to be $155,000,000, an increase of more than 84 per cent, by a recent vote of the directors the stock of this new company amounts to $250,000,000.

The plan of re-organization having been adopted, and all the property of the Northern Pacific Railroad Company having been sold under decree of the Court to the Northern Pacific Railway Company and the $155,000,000 stock issued as indicated above, one-third of the $75,000,000 of the common stock amounting to $25,000,000 par value was allotted to a syndicate, and acquired for $4,000,000, who have been receiving dividends of 8 per cent on this $25,000,000 or 50 per cent on the amount invested. The dividends for two years has paid the price given by them for the stock. The $4,000,000 investment is commanding on the market more than $40,000,000, or more than 900

per cent. For the retirement of $24,590,000 of Northern Pacific first mortgage bonds there were issued new prior lien bonds amounting to $33,196,000, an inflation of $8,606,000 or 35 per cent. For the conversion of $19,158,000 second mortgage bonds, $32,281,000 of prior lien bonds and preferred stock was issued, an increase of $13,123,000 or 18 per cent. For the conversion of $11,314,000 of third mortgage bonds, there were issued general lien bonds and preferred stock for $19,064,000, an increase of $7,750,000 or more than 68 per cent. In place of $45,104,000 of consolidated mortgage bonds there were issued $58,184,000 of general lien bonds and preferred stock, an increase of $13,080,000 or 29 per cent.

The distinction between the bondholders of the Northern Pacific Company and its stockholders, in this reorganization, is shown by the following; while the bondholders received $1,350 for every $1,000 bond in the old corporation, the stockholders were required to pay to acquire stock in this new corporation, $15 for preferred stock and $10 for common stock, when at the time the market value of such stock was $10 per share; by this scheme the value of the stock in the hands of the original stockholders of the Northern Pacific Railroad Company was destroyed, and they were eliminated from further consideration.

If we turn to the report of the special master as to the sale under the decree of foreclosure of all the proprety of the Northern Pacific Railroad Company, as specified in the statement of the committee above mentioned, we find that the entire railroad system of the Northern Pacific Company, being 4,706 miles in length, was sold for $10,000,000. The fifty-four corporations that had issued $380,000,000 in bonds, of which $271,949,044, was owned

by the Northern Pacific Railroad Company, were sold for $2,000,000; the stocks and bonds owned by the Northern Pacific Company were sold for $500,000; the land grant consisting of 43,000,000 acres of land was sold for $2,545,000, making a total of $15,045,220. The sale of the real estate belonging to the Northern Pacific Railroad Company east of the Missouri river, sold on the sequestration proceedings to pay the creditors of said company, the amount received from said sale gave to the creditors a little less than three cents on the dollar, so that under this plan of re-organization the creditors and stockholders of the company, were both wiped out; all of the property went to the bondholders. If what has been stated is true, the case presents the greatest swindle on the creditors and stockholders and the general public that has come to my notice in this age of frenzied finance.

Can it be possible that there is any water in this business? Something of that kind must be connected with these figures.

Surely the re-organization of public utilities is the safest and most profitable form of robbery. The present tendency of modern finance is towards the more profitable manufacture of water bonds. The principle objects of re-organization are to appropriate the accrued values of frnachise property; to increase the bonded debt enough to absorb all present earnings, and to deceive the pubilc as to the actual costs of the investment—to give to airy nothings a local habitation and a name.

It may be safely affirmed, judging from these facts, that the Wall street speculators, who were interested in

the re-organization of the Northern Pacific Railroad Company were not moved purely by altruistic considerations. The real necessity for such re-organization is not to be found in the insolvent condition of said company, but in the knowledge, that it was becoming a very valuable property. The re-organization was for the purpose of destroying the value of a large amount of its liabilities, for the benefit of a luxurious and unscrupulous class within the inner circle, that the remaining assets might be appropriated by private individuals to enrich themselves at the expense of others.

In this large grant of the public domain, the people had some rights, as well as the company. The act of July 2, 1864, was not passed for the sole benefit of the Northern Pacific Railroad Company. Mutuality in benefits was expected and intended, and mutual obligations were entered into, and equity and good conscience would require of both parties a faithful observance of these obligations.

In my opinion the court had no legal authority to decree the sale of these lands lying between Lake Superior and the Missouri river, and the Northern Pacific Railway Company did not acquire any right to them.

One stands amazed at the mendacity concealed in the figures presented in this plan for the re-organization of the Northern Pacific Railroad Company. With a mortgage for $190,000,000 payable at the expiration of 100 years from its date, the annual interest on which being 4 per cent, payable quarterly in gold, covering 4,706 miles of railroad, including also 43,000,000 acres of land, the free gift of the government. In this enlightened age it does not seem possible that such a mortgage would be executed. It will be a burden on public utilities, upon generations

yet unborn; it would be contrary to all our notions of right and justice, and should be declared absolutely void as being against public policy.

The creditors of the Northern Pacific Railroad Company, together with the stockholders of said Company, can console themselves, however, with the fact, that without these altruistic gentlemen who have made themselves active in this scheme for re-organization, should be able to cross the chasm of death and put on immortality, they will not be in a situation to re-organize the company, when these mortgages mature, they will no doubt be engaged in other useful employments and in a locality, where the wicked cease from troubling.

THE LAND DEPARTMENT.

In order that the Court may understand how this controversy arose, the complainant deems it advisable to state the facts concisely. The Northern Pacific Railroad Company commenced the construction of its road at a point known as Thomson Junction in Section 1, T. 48 N., R. 17 W., at the junction with the Lake Superior & Mississippi Railroad, that road was the beneficiary of the State of Minnesota, who received a grant under the act of May 5, 1864, (13 Stat. at L. 64), to aid of the construction of a railroad from St. Paul to Lake Superior. This grant was prior to that of the grant to the Northern Pacific Railroad Company, whose grant was of the date of July 2, 1864.

The Northern Pacific Railroad Company commenced the construction of its railroad in 1871, from Thomson Junction, westwardly from that point on its definite line of location. It subsequently purchased and acquired an

interest from the Lake Superior & Mississippi Railroad Company of its railroad, which had been constructed from Thomson Junction to Duluth, and it ran its trains over that line for thirteen (13) years. It subsequently constructed its line of road from the intersection with the Lake Superior & Mississippi Railroad Company, easterly from that point, to Superior, Wis., a distance of twenty-five (25) miles, and after the examination of said twenty-five miles by commissioners appointed by the president, and their report thereon, the road from Thomson Junction to Superior, was accepted. In the adjustment of the land grant of the Northern Pacific Railroad it became necessary for the land department to fix the eastern terminus of the Northern Pacific Railroad, and ater considerable discussion on that subject, the Commissioner of the General Land Office, with the approval of the Secretary, on August 27, 1896, fixed the eastern terminus of the Northern Pacific Railroad Company at Duluth. The Commissioner of the General Land Office, with the approval of the Secretary, cancelled the selections made by the Northern Pacific Railroad of all lands that were east of a line as shown by a diagram prepared by the land department and filed in the local land office at Duluth, and declared that all lands, which had formerly been selected by the Northern Pacific Railroad Company, east of said line was restored to the public domain and subject to disposal under the land laws of the United States. The land in controversy was situated east of Duluth and under this order was subject to disposal as belonging to the public domain. This being the situation, Richard B. Jones applied to purchase under the Timber and Stone Law, the land in controversy, and complied with all the rules and regulations of the department required of him to entitle him to said land, paid his money

for the same and obtained the usual receipt. Subsequently the Supreme Court, having the question as to the eastern terminus of said road before it, decided that such terminus was at Ashland, Wisconsin, and not at Duluth; therefore, the Commissioner of the General Land Office, with the approval of the Secretary, on July 12, 1900, vacated his former order, cancelling the Northern Pacific Railroad Company's selections of said land, and restored the former list of selections to the record, and subsequently considered the application of Richard B. Jones for this land, rejected the same, because his application conflicted with the former selection of said land by the Northern Pacific Railroad Company, and afterwards patented the land to the Northern Peafiic Railway Company, without returning or offering to return the amount paid to the United States by Richard B. Jones, for said land. This action is for the purpose of obtaining a decree of this court that the title to this land was vested in Richard B. Jones and that the claim of title set up by the defendants is illegal and void, and should be removed from the record.

STATEMENT OF THE CASE.

On December 17, 1897, Richard B. Jones, being in all respects duly qualified, tendered his application to purchase the Southwest quarter of Southeast quarter (SW¼ of SE¼), Sec. 7, T. 54 N., R. 14 W., in the Duluth Land District, under the provisions of an act of Congress, dated June 3, 1878, entitled "An act for the sale of timber lands in the State of California, Oregon and Nevada, and in Washington Territory," as extended to all the public land states, by act of August 4, 1892. Accompanying the same

was the usual affidavit required in such cases. Jones tendered his application, which was by those in charge of the local United States land office at Duluth accepted and received, such proceedings were afterwards had on said application, that the necessary proofs were taken and completed March 22, 1898, and on December 10, 1898, Jones made payment for the land, and received the usual evidence of title to the same from the Receiver.

On December 19th, 1898, the said Richard B. Jones and wife sold and conveyed to Minnie Stewart, by warranty deed, this land, receiving a valuable consideration therefor. On March 22, 1902, the said Minnie Stewart with her husband sold and conveyed, for a valuable consideration, this land to the complainant. The question involved in this contention is to whom the title of this propertp belongs.

The Northern Pacific Railroad Company, who obtained a grant from the United States to aid in the construction of a railroad from Lake Superior to Puget Sound, in the definite location of its line, found that the base land for which indemnity is claimed in this controversy, fell within the place limits of its grant and it having been patented by the governor of the State of Minnesota, as belonging to land granted to the State of Minnesota, in aid of the construction of a road from Lake Superior to St. Paul, the defendants by reason of its claims, had the right to select as indemnity this land. This proposition is denied by the complainant.

ACT OF JUNE 3, 1878.

The several decisions of the land department in this case demand an examination of the act of 1878, to ascertain what rights the complainant has under the act, and whether the department, by a misapplication of the law to an admitted state of facts, has deprived the complainant of that to which he has acquired a right under the sanction of that act.

The act of June 3, 1878, provides that land valuable chiefly for its timber, but unfit for cultivation, and which has not been offered at public sale according to law, may be sold to citizens of the United States in quantities not exceeding one hundred sixty (160) acres, to any one person, at the minimum price of two dollars and fifty cents per acre. Any person desiring to avail himself of the provisions of this act is required to file with the register of the proper land district, a written statement in duplicate designating by legal subdivisions, the particular tract of land he desires to purchase; this statement must be verified by the oath of the applicant before the register or receiver of the land office within the district in which the land is situated.

By an examination of the record in this case (Record p. 25), we find that Richard B. Jones made the written statement in the manner required by law to purchase this land, the date of said application being December 17, 1897. His application being accompanied with the sworn statement required to be made, and verified in the manner specified in the act, his application to purchase said land was accepted, and the usual certificate upon payment for said land was issued. When the timber applicant files with the register a written statement, verified as the law requires, he initiates a valid claim to the land and has a

preference right to purchase against everybody, but a prior claimant and the United States. The prior claimant, if any exists in this case, was the Northern Pacific Railroad Company. Whatever claim it had to the land arose from its preliminary selection of this land on October 17, 1883. The United States never asserted any claim to this land, other than the general one that the land belonged to the public domain. The existence of an adverse claim does not affect the validity of the timber and stone filing, but such claim must be disposed of in some way before the claim of the applicant under the act of 1878 could be allowed, and when it appears in such a case that there may be an adverse claim, a hearing should be ordered, and if it should be found that such adverse claim was valid, the rights of the timber applicant would thus be disposed of. The power of the department to cancel entries of this character upon sufficient proof that the land at the time of the filing of the written statement was not subject to entry, is not disputed, but it is insisted that the department can only act in such cases within the law, the Secretary is not authorized to destroy a title to land in an arbitrary manner, or if he does he misapplies the law, and the Courts will grant relief.

On the 5th day of May, 1864 (13 Stat. at L. p. 64), Congress passed an act entitled, "An Act making a grant of lands to the State of Minnesota, to aid in the construction of the railroad from St. Paul to Lake Superior." The first section of said Act is as follows:

> "That there be and there is hereby granted to the State of Minnesota, for the purpose of aiding in

the construction of a railroad in said state from the City of St. Paul to the head of Lake Superior, EVERY ALTERNATE SECTION OF PUBLIC LAND OF THE UNITED STATES, NOT MINERAL, DESIGNATED BY ODD NUMBERS, TO THE AMOUNT OF FIVE ALTERNATE SECTIONS PER MILE ON EACH SIDE OF THE SAID RAILROAD ON THE LINE THEREOF, WITHIN THE STATE OF MINNESOTA; BUT IN CASE IT SHALL APPEAR THAT THE UNITED STATES HAVE, WHEN THE LINE OF THE ROUTE OF SAID ROAD IS DEFINITELY FIXED, SOLD, APPROPRIATED, RESERVED OR OTHERWISE DISPOSED OF ANY SECTIONS OR ANY PARTS THEREOF, GRANTED AS AFORESAID, OR THE RIGHT OF PREEMPTION OR HOMESTEAD SETTLEMENT HAS ATTACHED TO THE SAME, THEN IT SHALL BE THE DUTY OF THE SECRETARY OF THE INTERIOR TO SELECT FROM THE LANDS OF THE UNITED STATES NEAREST TO THE LINES OF SECTION ABOVE SPECIFIED, IN ALTERNATE SECTIONS, OR PARTS THEREOF, SO MUCH PUBLIC LAND OF THE UNITED STATES, NOT MINERAL, AS SHALL BE EQUAL IN AMOUNT TO SUCH LANDS AS THE UNITED STATES HAVE SOLD OR OTHERWISE APPROPRIATED, or to which the rights of pre-emption or homestead settlement may have attached as aforesaid, which land thus selected in lieu of those sold, reserved or otherwise appropriated, or to which the right of pre-emption or homestead settlement may have attached, as aforesaid, together with the sections and parts of sections, designated as aforesaid, and appropriated as aforesaid, shall be held and disposed of by

the said state for the uses and purposes aforesaid. PROVIDED, THAT THE LAND TO BE SO SELECTED SHALL IN NO CASE BE LOCATED FARTHER THAN TWENTY MILES FROM THE LINES OF SAID ROAD. And, provided further, that the lands shall be exclusively applied in the construction of and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided. Provided, also, that no part of the land granted by this act shall be applied to aid in the construction of any railroad or part thereof for the construction of which any previous grant of land may have been made by Congress. And, provided further, that any and all lands heretofore reserved to the United States by an act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States, from the operation of this act."

On the 7th day of May, 1864, the grant of May 5, 1864 (supra), being vested in the Lake Superior & Mississippi Railroad Company, said company on that date filed with the Commissioner of the General Land Office a map or diagram showing the general route of its road from St. Paul to a point on Lake Superior, in the NE¼, Sec. 19, T. 51 N., R. 12 W., (Map Record p. 42), and on May 26, 1864, the Commissioner of the General Land Office transmitted a letter to the Register and Receiver of the United States Land Office at Duluth, of which the following is a copy:

"General Land Office, May 26, 1864.

Register and Receiver,

Duluth, Minnesota.

Gentlemen:

By the act approved May 5, 1864, a grant of lands was made to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior. The Secretary of the Interior having approved of a withdrawal of lands for said road, you will suspend from pre-emption, settlement and sale, a body of lands about twenty miles in width, as indicated on the enclosed diagram "A" marked "Lake Superior and Mississippi Railroad."

Acknowledge the date of receipt of this.

Very Respectfully Your Ob't Servant,

J. M. EDMONDS,

Commissioner.'

On July 13, 1866 (14 Stat. at L. p. 93), Congress passed an act to amend "An Act making a grant of lands to the State of Minnesota to aid in the construction of the railroad from St. Paul to Lake Superior," approved May 5, 1864, which is as follows:

"That Section One of the act entitled, "An Act making a grant of Lands to the State of Minnesota to aid in the construction of the railroad from Saint Paul to Lake Superior," approved May 5, 1864, be amended by adding thereto the following: Provided, further, that in case it shall appear, when the line of the Lake Superior and Mississippi Railroad is definitely located, that the quantity of land intended to be granted by the said act in aid of the construction of the railroad shall be deficient by reason of the line

thereof running near the boundary line of the State of Minnesota, the said company shall be entitled to take from such other public lands of the United States within thirty miles of the west line of said road such amount of lands as shall make up such deficiency, Provided, that the same shall be taken in alternate odd sections as provided for in this act."

On September 25, 1866, the Lake Superior & Mississippi Railroad Company filed in the office of the Commissioner of the General Land Office a map showing the definite location of its railroad from St. Paul to Duluth at the head of Lake Superior (see map Record p. 42); that thereafter the Commissioner of the General Land Office, marked and designated upon the plats of his office the ten-mile, or place limits of said grant; the twenty, or indemnity limits of said grant, and also the thirty-mile limits on the west side of the line of road. On November 2, 1866, the Commissioner of the General Land Office, with the approval of the Secretary, transmitted to the Register and Receiver of the local office at Duluth, a letter, of which the following is a copy:

"DEPARTMENT OF THE INTERIOR,
General Land Office,
Washington, D. C., Nov. 2, 1866.

Register and Receiver,
Duluth, Minn.

Gentlemen:

Herewith is a diagram showing the line of route as definitely located, of the Lake Superior & Mississippi Railroad, with the ten, twenty and on the west side of the thirty-mile limits indicated thereon, act May 5, 1864, and July 13, 1866. The odd sections

within all three of these limits will be withdrawn from sale or location, pre-emption or homestead; except in so far as valid pre-emption claims may have accrued to the same, prior to the withdrawal of May 26, 1864, within the limits therein designated, and prior to the receipt of this order, outside of the limits fixed in that withdrawal. As the act of 1864, reserves from the grant any and all lands theretofore reserved, for the purpose of aiding in any object of internal improvement or for any other purpose whatsoever, no reserved lands are subject to the opeartion of the grant. You will mark the line of route with the several limits on the township plat in pencil and you will report the fact of its having been done.

The railroad company will be required, first, to make their selections from the 10 and 20-mile limits, if it is then found that a deficiency exists, the same can be made up by selections from the 30-mile limits. This order will take effect from the date of its receipt, at your office, and you will advise me of the precise time it may be received by you.

Very respectfully,

Your Obedient Servant,

JOS. W. WILSON,

Commissioner."

The act of July 13, 1866, being simply an enlargement of the act of May 5, 1864, should be so construed as though the amendment was part of the original act, and to be held to pass the title to the grantee, as against the United States, and against all persons not having acquired that title previous to the amendment. The title to the increased quantity of lands, must, with the exceptions men-

tioned, be deemed to have passed to the State of Minnesota at the date of the original act.

On July 2, 1864, Congress approved of an act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route, the quantity of lands granted was:

> "Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile, on each side of said railroad whenever it passes through any state," * * and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

On May 31, 1870, by joint resolution, Congress extended the indemnity limits of the Northern Pacific Railroad Company within ten miles on each side of the railroad, beyond the limits prescribed in said charter.

The limits then, of the Northern Pacific Railroad Company's grant, including its indemnity limits within the State of Minnesota, would be forty miles on each side of the center line of its road, or eighty miles in width. It

would cover to that extent the grant to the State of Minnesota, under date of May 5, 1864, as with a blanket, and the lands in such over-lapping limits, by reason of the prior grant to the State of Minnesota, and the withdrawals for the benefit of Lake Superior & Mississippi Railroad Company, its beneficiary, dated May 26, 1864, and Nov. 2, 1866, would all be excepted from the grant to the Northern Pacific Railroad Company, and would not pass under that grant to the railroad company, and if indemnity was allowed for such loss, it could only be had within the first indemnity of said grant, and therefore the selection of the land in controversy in the second indemnity could not have been legally selected, and was unauthorized and void. The evidence in this case shows that the land for which indemnity was sought, was within the limits of the grant for the L. S. & M. R. R. Co., and was patented to the State of Minnesota for the benefit of the L. S. & M. R. R. Co. and conveyed by the state to it. The Northern Pacific Railroad Co. crossed the grant of the L. S. & M. R. .R Co. at this point nearly at right angles, the place limits of the Northern Pacific grant on the north was beyond the line of the general route of the L. S. & M. R. R. Co. The base land was within the place limits of the grant to the Northern Pacific Railroad Co. as well as within the indemnity limits of the L. S. & M. R. R. Co. and included within the withdrawal on the definite location of said road. Lands thus situated were excluded from the grant to the Northern Pacific Railroad Co. by Section Three of said act, and no indemnity could be had for such loss, but should be charged to the Northern Pacific Railroad Company under this provision of Section Three of said act.

"Provided, That if said route shall be found upon the line of any other railroad route to aid in the con-

struction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

I claim that all the lands within the place and indemnity limits of the L. S. & M. R. R. Co., together with all the lands included in the withdrawals of May 26, 1864, and Nov. 2, 1866, were excepted, and excluded from the grant to the N. P. R. Co.

It will be conceded that if the base land was lost to the Northern Pacific Railroad Company, prior to the date of its grant, the indemnity for such loss must be had within the first indemnity limits of said road; for it is so declared in the third section of the granting act of July 2, 1864, in which it is said that,

> "Whenever prior to said time, any of said sections, or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

The joint resolution of May 31, 1870, which provided for a second indemnity limit, states that in the event of there not being in any state of territory in which the railroad may be located the amount of land per mile granted by Congress to said company within the limits prescribed by its charter,

"Then said company shall be entitled to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory within ten miles on each side of said road beyond the limits prescribed in said charter, as will make up said deficiency, except mineral, and other lands as excepted in the charter of said company of 1864, to the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of SUBSEQUENT TO THE PASSAGE OF THE ACT OF JULY 2, 1864."

The question here to be determined is, was the base land lost to the grant to the Northern Pacific Railroad Co. prior, or subsequent, to July 2, 1864? It appears that on May 5, 1864, Congress approved of an act, granting to the State of Minnesota, aid in the construction of a railroad from St. Paul to Lake Superior—a copy of said act has been heretofore referred to. That on May 7, 1864, the L. S. & M. R. R. Co., the beneficiary of said act filed its map of its general route, and on May 26, 1864, the Commissioner made an order, withdrawing lands on each side of the line of general route of said road, a distance of twenty miles. On July 13, 1866, Congress passed an act amending said act of May 5, 1864, and after the map of the line of definite location had been filed, on November 2, 1866, issued another order of withdrawal. The base land was included within the lines of both of these withdrawals. As the act of July 13, 1866, should be construed as if it were a part of the original act, and the withdrawal would be "in pari materia" to it, the base land was lost prior to the grant to the Northern Pacific R. R. Co., and loss, if any,

should be sought within the first indemnity limits of said road.

The Northern Pacific R. R. Co. v. Musser, Sauntry Land Logging & Mfg. Co., 168 U. S. 596 (L. ed.) is in point.

The facts in that case were as follows: On June 3, 1856, Congress made a grant to the State of Wisconsin, to aid in the construction of a railroad of every alternate section of land designated by odd numbers, for six sections in width, on each side of the line, with the right to select indemnity within 15-mile limits. The line of this road was definitely fixed September 20, 1858. This grant was enlarged by the act of May 5, 1864, to one of ten alternate sections on each side per mile with indemnity limits extending to 20 miles from the line of the road. The Chicago, St. Paul, Minneapolis & Omaha Railway Co., one of the defendants, became the beneficiary of this grant. The road was afterwards constructed and the land in controversy was more than 15 but less than 20 miles from the line of definite location and construction. In March, 1866, the lands within the indemnity limits named in the act of 1864, were by the Secretary of the Interior withdrawn from sale and notice thereof given to the local officers. This withdrawal remained unrescinded and unaltered until 1889. In 1883, the defendant railroad company selected the lands in controversy in lieu of lands lost in its place limits. These selections were approved by the local land officers and transmitted to the Commissioner of the General Land Office for his approval. In the same year the State of Wisconsin issued patents for the land to that company, which thereafter sold and conveyed them to the grantors of its co-defendants, the land, logging and manufacturing company. On a readjustment of the land grant the railway company's title failed and thereafter the

grantee of the railway company purchased them, pursuant to the act of March 3, 1887. On the other hand, the Northern Pacific Railroad Company, on July 2, 1864, received a grant from Congress. The third section of the act making this grant contains a description of the lands granted. (See supra). On August 13, 1870, a withdrawal of the lands within 20 miles was ordered in aid of the grant. On July 6, 1882, the Northern Pacific Railroad Company definitely fixed that portion of its line opposite these lands. They were within the limits of the above mentioned withdrawal, and also within the place limits of the Northern Pacific grant. As those limits were adjusted and fixed according to the map of definite location. Relying upon the title acquired by this grant, and the proceedings had thereunder, the Northern Pacific Railroad Company brought suit to recover the same. Upon the facts above stated the Court said:

> "But a single question is presented in this case, and that is whether the withdrawal from sale by the land department in March, 1866, of lands within the indemnity limits of the grant of 1856 and 1864, excepted such lands from the operation of this grant to the plaintiff. It will be perceived that the grant in aid of the defendant railway company was prior in date to that to the plaintiff, and that before the time of the filing of plaintiff's maps of general route and definite location the lands were withdrawn for the benefit of the defendant. The grant to the plaintiff was only of lands to which the United States had "full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption, or other claims or rights at the time the line of said road is definitely fixed."

The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid and operated to withdraw the odd numbered sections within its limits from disposal by the land officials of the government, under the general land laws. The act of the Secretary was in effect a reservation. Walcott v. Des Moines Nav. & R. R. Co., 72 U. S. 689; Wolsey v. Chapman, 101 U. S. 915, and cases cited in the opinion. It has also been held that such a withdrawal is effective against claims arising under subsequent railroad land grants. St. Paul & Pacific R. R. Co. v. Northern Pacific R. R. Co., 139 U. S. (L. ed.) 77-84; Wisconsin Central R. R. Co. v. Forsythe, 159 U. S. 71-74 (L. ed.); Spencer v. McDougal, 159 U. S. 71-74 (L. ed.). * * *

But beyond the significance of the word "reserved," alone, there are other words in the act which, taken in connection with it, make it clear that these lands do not fall within the grant. "Otherwise appropriated" is one term of description, and evidently when the withdrawal was made in 1866, it was an appropriation of these lands so far as might be necessary for satisfying that particular grant. It is true it was not a final appropriation or an absolute passage of title to the state or railway company, for that was contingent upon things thereafter to happen, first, the construction of the road, and, second, the necessity of resorting to those lands for supplying deficiencies in the lands in place; still it was an appropriation for the purpose of supplying any such deficiencies. Again, in the description, the the words, "free from pre-emption or other claims or rights." Certainly, after this withdrawal the Wisconsin Company had the right, if its necessities required by reason of a failure of lands

in place, to come into the indemnity limits and select other lands. Can it be said that they were free from such right when the very purpose of the withdrawal was to make possible the exercise of the right? But the language is not simply "free from rights," but "free from claims," and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term, and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road. Northern Pacific Railroad Co. v. Saunders, 166 U. S. 620. And such is the general rule in respect to railroad land grants.
* * *

In United States v. Southern Pacific Railroad Co., 146 U. S. 1091-1101 (l. ed.), it was said: "Indeed, the intent of Conress in all railroad land grants, as has been understood and declared by this court again and again, is that such grant shall operate at a fixed time, and shall take only such lands as at that time are public lands."

The withdrawal of May 26, 1864, and that of November 2, 1866, was made in favor of an earlier land grant, and made prior to the filing of the map of definite location by a company having a latter grant, the latter having such words of exception and limitations as are found in the grant to the Northern Pacific R. R. Co., the withdrawal operates to except the withdrawn lands from the scope of such latter grant.

When the definite line of a land grant railroad is established, the grant takes effect upon the sections granted by relation as of the date of the act of Congress. The grant is one in presenti. It cuts off all other claims, others than those mentioned to any portion of the lands from the date of the act, and passes the title as fully as though the selections had been capable of identification. When the L. S. & M. R. R. Co. was definitely located it supplanted the Northern Pacific Railroad Co. not only as to granted, but also as to indemnity lands at the point of intersection. This was absolutely necessary to give effect to the proviso. If the lands in the indemnity belt of the L. S. & M. R. R. Co., were not subject to the grant to the Northern Pacific Railroad Co. at the time the latter grant took effect, then no change in their condition afterwards could bring them within the operation of that grant. All grants of this description are strictly construed against the grantees; nothing passes but what is conveyed in clear and explicit language. This is the law as declared in the case of the United States v. Southern Pacific R. R. Co., 146 U. S. 1092 (l. ed.), in which the Court said:

> "When the specific tracts were designated by the filing of the map of definite location, the title to the land attached as of the date of the grant. If anything in the land laws of the United States can be considered as thoroughly settled by repeated decisions it is this. It matters not when the map of definite location of the Southern Pacific was filed and approved. Whether before or after the date of the definite location of the Atlantic and Pacific Railroad Company, or when filed the grant could take effect by relation only as of March 3, 1871, and at that time, and for nearly five years

theretofore, the title to these lands had been in the Atlantic & Pacific."

The grant to the Atlantic & Pacific R. R. Co. was made in 1866, to the Southern Pacific in 1871. The map of definite location of the Atlantic & Pacific was filed April 11, 1872, then the specific tracts were designated, and to them the title of the Atlantic & Pacific attached as of the date of its grant, July 27, 1866.

In the third section of the granting act of the Northern Pacific Railroad Company appears the following:

> "Provided, that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

What was the intention of Congress in enacting this paragraph, and inserting the same within the third section of the organic act, for it is the intent of Congress we must seek, however difficult it may be to discover the same. The grant to the Northern Pacific, including its indemnity limits, would make a strip of land 80 miles in width, in a state and 120 miles in the territories. It could make no difference whether this strip of land ran parallel to the grant to the L. S. & M. R. R. Co. or crossed the same at right angles. If the Northern Pacific was on the same general line the entire distance of the L. S. & M. R. R. Co. and overlapped its granted and indemnity limits then under the terms of this provision, all the lands within the granted limits of the Northern Pacific which overlapped the grant to the L. S. & M. R. R. Co. would be deducted.

In other words, charged to the Northern Pacific for which no indemnity would be allowed to that company, the same result would follow, if the Northern Pacific should cross the L. S. & M. R. R. Co., the lands within the overlapping limits of said grant should be deducted—and no indemnity for its loss would under this provision be allowed.

The construction of all acts in favor of a corporation is to be construed strictly as against the corporation, nothing is to be taken by implication, that which is not clearly expressed, is not granted. The intention of Congress in the enactment of this provision was clearly to prevent the granting of aid in the construction of the Northern Pacific Railroad Co., which would allow that company to take within its place limits any lands which had been granted before to some other railroad, or to seek indemnity for said loss within its indemnity limits. Otherwise Congress would be making a double grant. Congress having granted aid to one road intended if a subsequent grant was made to another railroad, all lands within the prior grant should be deducted from the subsequent grant, for which no indemnity for its loss should be had.

This question has been determined by the Supreme Court of the United States in the case of the United States v. Southern Pacific R. R. Co., 146 U. S. 1091-1101 (l. ed.) The charter of the Southern Pacific R. R. Co., so far as this provision is concerned, is the same as that in the Northern Pacific charter The Court, speaking of this provision, says:

> "That proviso may not be technically and strictly applicable to this case, in that a road crossing another may perhaps not be said to be found upon the line of such other road, or to be on the same general

line, YET THE IMPORT OF THIS PROVISO IS CLEAR, to the effect that Congress was not intending to give to one company that which it had already given to another, but intended that lands previously granted should be definitely excepted from the latter grant."

If this is the law, then all the lands that were granted to the State of Minnesota by act of Congress of May 5, 1864, and July 13, 1866, including the lands withdrawn for its benefit embraced within the order of May 26, 1864, and November 2, 1866, that are within the overlapping limits of the Northern Pacific, should be deducted from the amount of lands granted to that company.

The bases upon which the land in controversy rests falls within this provision. The base land passed to the state as belonging to its grant. It was selected by the L. S. & M. R. R. Co. and patented to it by the state, it was within the place limits of the grant to the Northern Pacific Railroad Co. and within the overlapping limits of the Northern Pacific R. R. Co., and under the provision of the statute above mentioned should have been deducted from the amount of land granted to the Northern Pacific R. R. Co. and no indemnity for its loss allowed.

This course was not adopted, but the Northern Pacific treating this tract of land as lost to its grant, because selected by and patented to the L. S. & M. R. R. Co., selected this land in controversy in lieu thereof, such selection could not legally be made.

The act of May, 1864, provides that lands reserved for any purpose within the limits of its grant shall be excepted therefrom; but indemnity for its loss may be obtained. The act also provided that in case of loss, indem-

nity shall be sought by selection of land nearest to the line of sections granted. The L. S. & M. R. R. Co. could not select state swamp land, because it was reserved, it was of such a character that it was required to pass it by, and select indemnity for its loss in the next tract that met the requirements. The Northern Pacific subsequently came along gleaning in the same field, and selects indemnity for the same swamp land that the L. S. & M. R. R. Co. had prior to that received indemnity for its loss, when under the provisions of the law as before cited nothing of the kind should have been allowed.

I claim that under the provisions of its charter the Northern Pacific Railway Company could not legally select within the indemnity limits of its grant land in lieu of any claimed to have been lost within its overlapping limits of the grant to the State of Minnesota of May 5, 1864.

In Winona & St. Peter R. R. Co. vs. Barney, 113 U. S. 1109, the Supreme Court of the United States construed a provision of an act of Congress approved March 3, 1865, amending an act of 1857, which increased the grant under the original act of 1857 from 6 to 10 sections and provided that all lands located within the extension of the grant by the act of 1865, which may have been granted for the purpose of aiding in the construction of any railroad should be deducted from the full quantity of land granted by the act of 1865. The court held that the reservation of lands within the four sections granted by the act of Congress of 1865, was only a legislative declaration of that which the law would have pronounced independently of it, as previous grants of the same property would necessarily be excluded from subsequent ones. The same principle would apply to the proviso in the third section of the

act of July 2, 1864, to aid in the construction of the Northern Pacific Railroad Company.

The only way in which force could be given to the proviso in Section 3 of the act of July 2, 1864, was to hold that the indemnity lands of the Lake Superior & Mississippi Railroad Company under the act of Congress of May 5, 1864, were exempt from the grant of the Northern Pacific Railroad Company, for if not exempt the former company's prospective right of selection would be to that extent impaired. When the Lake Superior & Mississippi Railroad Company definitely located its line, it not only supplanted the Northern Pacific Railroad Company as to its granted but also as to its indemnity lands at the point of intersection. This was absolutely necessary to give proper effect to the proviso.

We therefore insist that by the act of Congress of July 2, 1864, granting aid in the construction of the Northern Pacific Railroad Company under the provision in the third section of said act, the land lost for which the indemnity is claimed was of the character which was to be deducted from the quantity of land granted to said company for which no indemnity could be obtained.

If this is not correct, then the land claimed to have been lost within the granted limits of the Northern Pacific Railroad Company was lost prior to the date of its grant, and if indemnity is to be sought for its loss then such indemnity should be found within the first indemnity limits of its grant.

THE ACT OF JULY 1, 1898.

It is claimed by the complainant, that Jones, the purchaser of this land, is protected in his title under the provisions of the act of July 1, 1898, which provides:

> "That where, prior to January 1, 1898, the whole or any part of an odd-numbered section in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor, *is claimed to have attached by definite location or selection, has been purchased directly* from the United States, or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States, or any ruling of the Interior Department, and where purchaser, settler or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee, or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select, in lieu of the land relinquished, an equal quantity of public lands, surveyed or unsurveyed, * * * situated within any State or Territory into which said railroad grant extends, and patents shall issue for the lands so selected as though they had been originally granted."

What was the intention of Congress in the passage of this act; for when the intent is ascertained, it is to control its interpretation. The act is to receive such a construction, as will carry out the intent of Congress, however difficult it might be to give full effect to the language used. The object of all interpretation is to ascertain the intent of the lawmakers; to get at the meaning which they wish their language to convey. Courts are to accord a

meaning, if possible, to every word in a statute. The admitted rules of statutory construction declare that a legislature is presumed to have used no superflous words. In putting a construction upon any statute every part must be regarded, and must be so expounded, if practicable, as to give some effect to every part of it, and where a given construction would make a word redundant, it was reason for rejecting such construction. No words are to be treated as surplusage or as repetition. The phrases in this act of the words, "purchased directly from the United States," or "settled upon," or "claimed in good faith," or by "color of title," or by " claim of right," must therefore each have some distinctive meaning. We are seeking for the intention of Congress, and to discover that we may also look at the paramount object which Congress had in view, in the passage of this act, as well as the means by which it proposed to accomplish that object.

In the case of Humbird v. Avery, 110 Fed. Rept., p. 465, Judge Lochren, in speaking of the act of July 1, 1898, said:

> "The obvious purpose of this act was to provide a certain, speedy and equitable way in which all controversies between the railroad grantee, or its successors, and purchasers or settlers upon odd-numbered sections within the place or indemnity limits of the land grant who claimed by color of any law of the United States, or any ruling of the Land Department, should be settled and adjusted, without contest or litigation, either in the Land Department, or in the courts, the railway company by its express acceptance of the act became bound by its provisions, and obligated to carry out its terms. * * *

"The situation at the time of the passage of the act of July 1, 1898, was this: By reason of the erroneous ruling of the Secretary of the Interior as to the location of the eastern terminus of said railroad, *and his revocation of his prior approval* of lawful selections by the railroad company of indemnity lands, and permitting sales and entries of such selected lands, as unappropriated, he had introduced confusion and conflict in respect to the right to such lands, which was beginning to be litigated in the courts; as the suits which resulted in the supreme court decisions above cited had then been commenced, and very much litigation seemed probable. The fact that patents had issued in a few instances would not end such disputes as to the lands so patented, as the courts would adjudge the patentee in any case to hold the title in trust for the other party, wherever the other party had clearly the right to the land. The quieting of claims and titles to such a vast area of land, was matter of public concern, and it was proper and beneficent legislation on the part of congress to thus provide for the settlement and ending, with the full consent and through the voluntary action of the parties in each instance. * * * Complainants' contention that the act of July 1, 1898, only applies to lands claimed by "settlers" cannot be maintained. The language employed is broad enough to include all purchases from the United States, under any law, or ruling of the Land Department."

In the case of Humbird v. Avery, 195 U. S. 286-295 (L. ed.), Mr. Justice Harlan, in delivering the opinion of the court, said:

"Obviously, the first inquiry should be as to the object and scope of the act of 1898. Upon that point we do not think any doubt can be entertained, if the words of the act be interpreted in the light of the situation as it actually was at the date of its passage. Here were vast bodies of land, the right and title to which was in dispute between a railroad company holding a grant of public lands, and occupants and purchasers, both sides claiming under the United States. The disputes had arisen out of conflicting orders or rulings of the Land Department, and it became the duty of the government to remove the difficulties which had come upon the parties in consequence of such orders. The settlement of those disputes was therefore, as the circuit court said, a matter of public concern. If the disputes were not accommodated, the litigation in relation to the lands, would become vexatious, extending over many years and causing great embarrassment. In the light of that situation Congress passed the act of 1898, which opened up a way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned, the government, the railroad grantee and individual claimants. The railroad company evinced its approval of this action of the legislative department by a prompt acceptance of the act in its entirety. By such unqualified acceptance the railroad company agreed that, so far as it had any claim to the lands in dispute, whatever the act of Congress required to be done might be done."

Viewed in the light of these decisions, can there be any question but that the intention of congress in the en-

actment of this law was to protect all claimants to land within the disputed territory, who prior to January 1, 1898, claimed such land under any law of the United States, or any ruling of the Secretary of the Interior. The right to the benefit of the act was fixed at the date when in good faith Jones made his claim to the land. The decision of the Land Department that none are entitled to the benefits of this act except a purchaser whose entry is completed by payment prior to January 1, 1898, or a "settler" on the land prior to that date, is a construction altogether too narrow. It not only violates the fundamental rules of statutory construction, but leaves open to litigation a vast number of disputed claims that it was the intention of Congress by this act otherwise to dispose of. The regulations issued to facilitate the adjustment by the land department of conflicting claims to lands within the limits of the grant to the Northern Pacific Railroad Company under the act of July 1, 1898 (28 L. D. 103); and the construction placed upon the act by the land department, as to who were the the beneficiaries under the act is stated in paragraph 1, on page 105, in which the Secretary of the Interior said:

> "The act designates a class of beneficiaries whose status is that of claimants adverse to the Northern Pacific Railroad Company or its successor in interest, and in doing so, different words and terms of description are used in different portions of the act, but considering the act in its entirety, and giving due recognition to each provision therein, this class embraces any qualified person who, prior to January 1, 1898, by settlement, entry or purchase, initiated in good faith a claim to lands of the description given "under

color of title or claim of right under any law of the United States, or any ruling of the Interior Department," and who is still maintaining such claim conformably to such law or ruling."

Subdivision C, paragraph 8, under the head of "What are the claims which come within the provisions of this act?" is answered:

"An individual claim adverse to the railroad claim is one which prior to January 1, 1898, was initiated in good faith by some qualified person, by settlement, entry or purchase "under color of title or claim of right under any law of the United States or any ruling of the Interior Department, * * * and which is still maintained conformably to such law or ruling, and is one which, in the absence of the railroad claim, could be perfected into full title."

In Jones v. Northern Pacific Railway Company, (34 L. D. 105), will be found the decision of the Secretary in this case, I quote all that was said by him in reference to the act of July 1, 1898:

"The application of Jones initiated no right as against the company, and his purchase no claim which can be recognized by the land department, unless it is protected by the provisions of the act of July 1, 1898, and this question involves consideration of the fifth and last specification of error on appeal.

If Jones had purchased this land from the United States prior to January 1, 1898, or if he had prior to that time made an entry thereof within the meaning of the act of July 1, 1898, he is entitled to an adjust-

ment thereunder. It is believed he has done neither of these things, while the application to purchase was presented prior to the date named, proof and payment were not made until after that date. There was no purchase until the money was paid. There was therefore no purchase prior to January 1, 1898. But it is contended that the application of Jones was the equivalent of an entry. No vested right is acquired by a timber and stone application, while such an application, if presented in accordance with law and for land subject thereto, reserves the land from other disposition by the land department, no right is initiated as against the government, and prior to the submission and acceptance of final proof and the payment of the purchase price, the Secretary of the Interior may suspend the same from disposition and sale under the public land laws. This was precisely what was done in this case. The tract was withdrawn from entry by the order of February 28, 1898, and the purchase of Jones, allowed in violation of that order, initiated no right falling within the remedial provisions of the act of July 1, 1898."

By this we find that all the Secretary deemed necessary to say with reference to the act of July 1, 1898, was, that if Jones had completed his purchase by payment prior to January 1, 1898, or had settled upon the land prior to that time, he would be entitled to an adjustment thereunder. No reasoning advanced why Jones should be thus limited—only a bare assertion of the fact. No construction of the act is given.

The Secretary states that this tract was withdrawn from entry by the order of February 28, 1898, 26 L. D. 265; the order referred to states:

> "While entry of these lands will not be allowed during this suspension, yet in all cases where entries have been allowed, the parties will be permitted to complete the same by making proof thereon, but the issue of patent will be suspended until such judicial determination."

Jones having applied for this land December 17, 1997, he would come within the exception in this order of suspension. This order, however, was modified by instructions from the land department dated April 4, 1898 (26 L. D. 488), being in response to a telegram from the register of the Duluth land office, of which the following is a copy:

> "Will this office, after taking proof in homestead entry, timber and stone entry, heretofore allowed, accept payment, issue final receipts and final certificates? Referring to suspended Northern Pacific land east of Duluth."

In answer to which the department says:

> "It is not the intention of this department to require of these entry men that they make payment at the time of their offer of proof, due to pendency in the courts of the question as to the legality of the company's claim to these lands, but where the money is tendered the usual final receipt and certificate will be issued if the proof is otherwise regular and satisfactory; but upon the final certificate issued by the

register, and the duplicate final receipt given to the entry men, will be noted, in red ink, across the face of each, the following: "This receipt (or certificate) is issued under the order of the Secretary of the Interior dated February 28, 1898, subject to any claim the Northern Pacific Railroad Company may have to the land herein described."

It thus appears that so far as this land is concerned, it was not affected by the order of February 28, 1898. The act of July 1, 1898, rendered the endorsement on the face of the receipt in red ink of no importance. The application of Jones made December 17, 1897, was the initiation of his claim to the land, and was one which, in the absence of the railroad claim, could be perfected into full title. The land was open for sale when Jones tendered his application. He had done all that he could do to perfect his right to the title of the United States. He has a legal right in this case to be preferred when the sale is made, against all others asserting a similar right under the law. It is not within the power of the Secretary arbitrarily to destroy a title, initiated under any of the land laws of the United States, but that is what he has endeavored to do in this case.

The act of July 1, 1898, was prepared by the agents of the Northern Pacific Railroad Company, and in its interest, and through its efforts it became a law. It is not necessary to show our respect for Congress by affecting to be ignorant that legislation of this kind is generally procured upon the solicitation of parties interested.

The bill was introduced in Congress January 21st, 1898, after the denial by the department of an application

of the Northern Pacific Railroad (December 13, 1897, 25 L. D. 501) for the suspension from entry, and patent the remaining undisposed lands in the odd-numbered sections within that part of the formerly recognized limits of the grant to said company lying east of the terminus established by department decision of August 26, 1896.

The order of February 28, 1898 (26 L. D. 265), was based on a petition of the Northern Pacific Railroad Company, dated January 20, 1898, for a reconsideration of the decision of December 13, 1897, above referred to.

It also appears that the United States, September 3, 1897 (26 L. D. 265), had commenced action against the Northern Pacific Railroad Company in the Circuit Court of the United States for the District of Minnesota to secure a judicial determination by the courts as to the eastern terminus of said road.

The Doherty case in the lower courts of Wisconsin had passed against the claim of said railroad company. A large number of suits had been instituted by the Northern Pacific Railroad Company in Minnesota, North Dakota, Montana and Washington. It was a general mixup, and this law was enacted, having for its underlying principle the quieting of disputes respecting the title to lands within the Northern Pacific land grant, and protecting settlers and other claimants under the public land laws from the claims and suits of the company.

The department was so confident as to the correctness of its decision on the question of the initial point, or eastern terminus of the Northern Pacific Railroad Company, that it resisted all efforts of the company in its desire for a suspension of entry of these lands; prior to

this the lands had been restored to the public domain. The lands were applied for by persons duly qualified, some of the lands passed to patent, other were purchased prior to January 1, 1898. While a large quantity of the lands unfit for cultivation, but valuable for its timber were applied for under the timber and stone law, and by reason of contest or other conflicting claims thereon, the applications were not acted upon prior to the order of suspension February 28, 1898.

It is not very consoling at this late date to be informed by the department that applicants in this class of cases have no such claim to the land as merits particular consideration by the departmnet.

The act of July 1, 1898, is not like any of the general land laws. It was passed for a particular purpose. If the courts had sustained the Secretary as to the eastern terminus, or decided that as against claimants for lands within the indemnity limits, that the Northern Pcaific Railroad Company had no title thereto (which the courts subsequently have done) without some law like that of 1898, the rights of the company might have been seriously affected.

The Northern Pacific Railway Company would never have consented to the act of July 1st, 1898, without it had previously considered its benefits. Under the act of July 1st, 1898, the company would be benefited whichever way the decision went. The simple fact that the land is upon an odd-numbered section within the granted or indemnity limit of the grant, and that it has been purchased, settled upon, or claimed, and the purchaser, settler or claimant, elects to hold his claim, would authorize the railroad company under the act of July 1st, 1898, to relin-

quish and select other lands. It would make no difference whether the selection by the company was good or bad, the jurisdiction of the department is not to determine the validity of the title acquired by such selection, there is no provision for a determination to be made under the act, of the company's right to the land. If, by the decision of the Secretary, the claimant's right to the land is denied, the company obtains title to the land. If the claimant's title is held valid, the company is in condition to receive valuable lieu land for the same. If the company's selection is held invalid for other causes another selection can be made. The Northern Pacific Railroad Company cannot lose in any event.

In this controversy, after all has been said, the simple fact remains, that the department, by an order dated August 27, 1896, fixed the eastern terminus of the Northern Pacific Railroad Company at Duluth, restored to the public domain all lands lying east of that place, which had been formerly selected by that company, and invited the entry of the same, refusing to suspend action until the question of the terminus could be judicially determined, allowing qualified persons to spend their money and labor in the endeavor to acquire title to a small tract, and after the court has subsequently determined the question of the terminus adverse to the rulings of the Secretary, by a strict construction of an act passed for the benefit of there persons, declare that by their applications to enter, made upon the invitation of the secretary, they have acuqired no rights to the land that the department was bound to espect.

Con such a conclusion be just? Would such action be considered honorable between man and man?

Is it not contrary to the spirit of the following paragraph in the opinion of the Supreme Court in the case of Humbird vs. Avery, 195 U. S. 286. Speaking of the act of July 1st, 1898, the Court said:

> "The dispute had arisen out of conflicting orders, or rulings, of the land department, and it became the duty of the government to remove the difficulties which had come upon the parties in consequence of such orders."

It must not be understood from what has been said, as a reflection in any way upon the department. The decision in the Eaton case (33 L. D. 426), follows logically from its interpretation of the law. After quoting from the act of July 1st, 1898, the Secretary says:

> "But two classes of individual claims are here described. First, those resting on a purchase didectly from the United States, and second, where the land has been settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department."

In this statement is classed as referring to one subject.

> "Land that has been settled upon, or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department."

We insist that the act of July 1, 1898, refers distinctly to three classes of persons who are beneficiaries under this act:

1st. A purchaser.

2nd. A settler.

3rd. A claimant.

The third clause "or claimed in good faith by any qualified settler under color of title, or claim of right under any law of the United States, or any ruling of the Interior Department," does not mean that the person making the claim must actually reside on the land; if this had been the intention of the act, the words would be mere surplusage. A settler had already been named, and the word settler in the act was used in a general sense, including any kind of settlement on the land; the word qualified settler, as used in the act means any person who makes a claim to the land having the qualifications of a settler, for no other person can acquire title to land under the general land laws, he must be a citizen, possessing the qualifications of a settler.

The words, claim and claimant, appear frequently in the act of July 1st, 1898; also, in the opinion of the Supreme Court in the case of Humbird vs. Avery (supra). These words are also used in the circular approved by the department of date February 14th, 1899, regulating the adjustment under this act. (28 L. D. 103), and in these regulations, the words claimed, and claimants, are used as distinct and separate from purchaser or settler. A claim is the assertion of the right of ownership. A claimant is the person who asserts that right. The act, as interpreted by the department, gives no force or effect to these words.

It is the duty of the officer having in charge the construction of a law, to effect the intention of the legislature, this intention is to be found from the words which

the legislature has employed in conveying it. If the legislature has made a plain provision, without exceptions, no exceptions can be made.

A law is the best exposition of itself, every part of the act is to be taken into view for the purpose of discovering what was in the mind of the legislature, when this has been found, it is to be enforced according to its obvious meaning.

It is a cardinal rule of statutory construction, that significance, and effect should, if possible, be accorded to every word, and that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each. In the construction of a statute the intention of the lawmaker is to be deduced from the whole statute, and every material part of the same. If the words of a statute are doubtful, or obscure, the intention of the legislature is to be resorted to in order to find the meaning of the words. We are not to look at any single phase of a statute, but to the whole scope, in order to arrive at the intention of the makers of it. There is no better way of discovering the true meaning of a law, where there are expressions in it which are rendered ambiguous in their connection with other clauses, than by considering the necessity for it, and the causes which induced the legislature to pass it. A statute ought upon the whole to be so construed that if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant. This act should be construed so as to effectuate the object which congress had primarily in view. I claimed that these rules of construction have been violated by the department in the decision of this case, I contend that the whole scope of the act,

when considered, includes claims for land such as is represented in this case.

THE ORDER OF JULY 9, 1896, HOLDING FOR CANCELLATION THE PRELIMINARY SELECTIONS, THERETOFORE MADE BY THE NORTHERN PACIFIC R. R. CO. THE DECISION OF THE SECRETARY OF THE INTERIOR DATED AUGUST 27, 1896 (23 L. D. 204), FIXING THE EASTERN TERMINUS OF THE NORTHERN PACIFIC R. R. CO. AT DULUTH, AND THE ORDER OF MARCH 22, 1897, CANCELLING THE SELECTIONS OF LAND LYING EAST OF DULUTH.

It will be noticed that prior to the decision of the Secretary dated August 27, 1896, fixing the eastern terminus of the grant to the Northern Pacific R. R. Co. at Duluth, the Land Department by its order of July 9, 1896, held for cancellation, the preliminary selections of said company to all lands lying east of Duluth. That after the decision of August 27, 1896, another order was made on March 22, 1897, finally cancelling said selections. It would appear that there were two questions involved in these orders: First, the order cancelling the selections, and, second, the decision of the Secretary as to the eastern terminus of said railroad. The first was a question of fact, the second may be considered a question of law and fact. The land in controversy is within the second indemnity limits of the grant to the Northern Pacific Railroad Company. The authority to select the same must be found in the Joint Resolution of Congress dated May 31, 1870.

That resolution declares that the company "shall be entitled under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency. "The selection of said land by said company was merely preliminary. There was no approval by the land department prior to the completion of Jones' entry. The Secretary not only by his order cancelled these selections, but restored the land to the public domain, and declared it subject to disposal in the same manner as other public lands. This order was not revoked until after Jones had applied for the land and completed his entry by payment. There was nothing said about the cancellation by the Secretary of these selections either in the case of Doherty v. Northern Pacific R. Co., 177 U. S. (l. ed.) 830, or in United States v. Northern Pacific R. Co., 177 U. S. (l. ed.) 836. Those cases simply decided that the eastern terminus of the Northern Pacific Railroad Co. was at Ashland, Wis., instead of Duluth, Minn. The Secretary of the Interior was simply in error as to that question—but it did not follow that because he erred in judgment as to that question the order of cancellation was also void. That was a matter in which he alone had jurisdiction. It was exclusively within his control. The Northern Pacific Railroad Company could obtain indemnity only through the Secretary of the Interior, for the resolution provides that the company shall receive under the direction of the Secretary, so many sections as will make up such deficiency. The cancellation of the selections was within the scope of the authority of the Secretary, and on questions of this kind his decision is generally

conclusive everywhere, even in a court of justice, nor can it be reversed or corrected in a collateral proceeding between private parties. The Secretary must pass upon many questions, previous to the approval of selections. His judgment upon these matters is that of a special tribunal, and is unassailable except in direct proceedings for its annulment. When the law has confined to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others. The railroad company had no vested right in these selections, the Secretary acted within the scope of his authority—the selections were in fact cancelled, and the land restored to the public domain. Whether the cancellation was right or wrong it was beyond the power of collateral attack, in controversy between private parties.

The Northern Pacific Railroad Co. claim to have made its selection of this land October 17, 1883, more than 23 years ago. There is no valid reason why, if said railroad company was entitled to this land, it should not have been awarded to it years ago. It is in evidence in this case that on a sale of the lands granted in aid of the construction of this road, to enforce the payment of the several mortgages given by said Northern Pacific Railroad Co. to the Farmers' Loan & Trust Co., that 38,000,000 acres were disposed of to the Northern Pacific Railway Co. Why is it that the legal title to this enormous quantity of land is still held by the government, that this land grant has not before this been adjusted, and the lands to which the company should have a title passed to it, and it required to bear its equal proportion of taxes, as land owned by private individuals. It is well known that no

patents are issued to said railroad without its requests and experience has shown that the holder of unproductive real estate is poor, and the more he owns the poorer he is. One thus situated will use his best endeavors to dispose of the same, shifting this burden on the shoulders of others, but as long as the government will hold these lands in trust for the railroad, and thus the company escapes the burdens that would arise from the ownesrhip of the same, just so long will the title be allowed to remain in that condition, awaiting the increased value from the labor of others, and the settlement of the country.

The remarks of the court in St. Paul, etc., R. R. Co. v. Winona R. R. Co., 112 U. S. (l. ed.) 872-876 are appropriate here:

> "Was there a vested right in this company, during all this time, to have, not only these lands but all the other odd sections within the twenty-mile limits on each side of the line of the road, awaits its pleasure? Had the settlers in that populous region no right to buy of the government because the company might choose to take them, or might after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market and withdrawn from taxation and forbidden to cultivation?"

The Northern Pacific Railroad Co. has no vested right in said land. It has only the right of selection, and having no other right, is bound to exercise that right with reasonable diligence.

In Sjoli v. Dreschel, 199 U. S. (l. ed.) 564, the court said:

> "That no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior. That up to the time such approval is given lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed by the United States, or to be settled upon and occupied under the pre-emption and homestead laws of the United States; and that the Secretary has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road. * * * The result of the cases in this court is that the railroad company did not acquire an interest in any particular lands within the indemnity limits merely by filing its lists of selection, nor until its selections were approved by the Secretary of the Interior. * * * The mere filing of its lists of selections of indemnity lands did not have the effect to exclude them from occupancy under the pre-emption or homestead laws. On the contrary, notwithstanding the filing of such lists they remained open, as before, to settlement or occupancy under those laws, until the selections were formerly approved by the Secretary of the Interior, and the lands withdrawn from settlement or sale."

The attorney general of the United States (35 L. D. 77) comes to the relief of the Land Department, with an opinion as to the construction to be given to this decision

of the Supreme Court. The Secretary says that he is not inclined to give to that decision the broad effect indicated if it can be avoided, and therefore submits the question, whether the Land Department is bound to follow the broad principles quoted from such decision, or whether the same should be construed with due regard to the particular facts set forth before the court, and limited accordingly. It was the opinion of the Attorney General, that the Land Department was not bound to follow the broad language used in that case, but may confine what is said in the Sjoli case to a state of facts in any other case similar to it.

This is a singular opinion, the Attorney General attempts to construe a decision of the Supreme Court, that is plain in its meaning, and needs no construction. He is simply giving his opinion as to how the Supreme Court should have decided, not what it did decide. He overlooks the fact that the court in the Sjoli case said:

> "That no rights to land within the indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior.
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> "That up to the time such approval is given, lands in the indemnity limits, although embraced by the company's list of selection, ARE SUBJECT TO BE DISPOSED OF BY THE UNITED STATES, or to be settled upon and occupied under the pre-emption and homestead laws of the United States."

How does the United States dispose of its land? The disposition of land belonging to the United States are disposed of in accordance with its land laws. The decision refers to a condition of things existing after the prelimin-

ary selection had been filed. It was after such filing that the court held that land could be disposed of up to the date of the approval of such selection. If no rights to land within the indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior, it follows logically that up to such approval the lands belonging to the United States, are unappropriated and subject to entry the same as any other public lands.

UNDER THE ACT OF JULY 2, 1864, THE NORTHERN PACIFIC RAILROAD COMPANY WAS LIMITED TO TEN ALTERNATE SECTIONS OF LAND PER MILE ON EACH SIDE OF ITS RAILROAD, WHENEVER IT PASSES THROUGH A STATE.

Section 3 of the act of July 2, 1864, enacts that there be, and hereby is granted to the Northern Pacific Railroad Company:

> "Ten alternate sections of land per mile on each side of said railroad whenever it passes through a state."

It also provided an indemnity limit of not more than ten miles beyond the limits of said alternate sections, for the selection of an equal quantity of land that had been disposed of by the government within the place limits of its grant, when the line of its road had been definitely fixed. Beyond these lateral limits the company could not seek indemnity. The intention of Congress in making this

grant was not only to have this road constructed but that the burden of its construction should fall equally on each side of the road, for each side would be equally benefited. If, on fixing the line of the definite location, it was found that lands had been "granted, sold, reserved, occupied by homestead settlers, or pre-emptied, or otherwise disposed of," other lands should be selected by said company in alternate sections and designated by odd numbers not more than ten miles beyond the limits of the alternate sections. The act provided that this ten-mile limit should be on each side of the railroad line. The grant of July 2, 1864, to the Northern Pacific Railroad Company, was ten alternate sections of land per mile on each side of the railroad line whenever it passes through a state. The language is plain, no construction of its meaning or the intention of Congress in using those words is necessary. It was not a grant of twenty sections of land per mile, or a permission to take 15 sections per mile on one side and five on the other, as might suit the convenience of the company. The grant to the Northern Pacific Railroad Company was not one of quantity, but for a certain number of sections in place, and if not found, then the company were allowed to look for the deficiency in other restricted limits, but such selection must be made of lands on the same side of the road, that the lands lost to its grant were situated.

If the company does not get its full amount of lands within its primary limits, and fails to make up its loss within its secondary limits on the same side of the line of its road in which the loss occurred, then it is a barren right. It is the happening of a contingency plainly contemplated in the granting act, subject to which the company made its contract.

If there were only nine sections of lands per mile sub-

ject to appropriation by the company within its place limits on the south side of its road, at the time of the definite location of its road, the company would have a right to select on the south side of its road one section of land within its first indemnity limits, not more than ten miles beyond the granted limits, if the land could not be found within the first indemnity limits, and the loss to the grant was subsequent to its grant and prior to its definite location, then under the joint resolution of May 31, 1870, the company could go into the second indemnity limits to make up the deficiency, but it must be on the same side of the road the loss occurred.

I am aware that this rule has not been observed by the department in allowing the selections for deficiency by this railroad company. It has been, and at the present time is, the practice of the Land Department to allow the Northern Pacific Railroad Company to roam anywhere within the lateral limits of its grant, and select land as indemnity—without regard to its location on the one side or the other of its line of road. That the department is in error in the allowance of such selections, I refer to the decision of the United States Circuit Court in the case of the United States v. Burlington & Missouri River R. R. Co., 4 Dillon 287, and afterwards affirmed in the Supreme Court of the United States, 98 U. S. (l. ed.) 198.

The syllabus in the case in the Circuit Court of the United States—the opinion in that case being delivered by Mr. Justice Miller, one of the justices of the Supreme Court of the United States—is as follows:

> "There was no authority in the grant to issue patents for land on the north side of the defendant's road, in lieu of lands deficient on the south side of its

road, and such patents are void. But, in a bill to have such patents declared null the lands must be described or identified."

By Section 18 of the act of Congress of July 2, 1864 (13 Stat. at Large 356), amending the act of 1862 (12 Stat. at Large 489), To aid in the construction of a Railroad and Telegraph line from the Missouri River to the Pacific Ocean and to secure to the Government the use of the same for Postal, Military and other purposes." The Burlington and Missouri River Railroad Company, an existing corporation under the laws of Iowa was authorized to extend its road through the Territory of Nebraska, etc.

Section 19 of the act is as follows:

"That for the purpose of aiding in the construction of said road, there be, and hereby is, granted to the said Burlington and Missouri River R. R. Co. every alternate section of public land (excepting mineral lands as provided in this act) designated by odd numbers, to the amount of ten alternate sections per mile on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

With the exception that this railroad had no lateral indemnity limits, the grant was similar to that in aid of the construction of the Northern Pacific Railroad Company. The United States brought its action to vacate and declare void the patents issued for certain lands on the north side of said road selected for indemnity for an equal

amount of land lost to its grant on the south side of its road. On this question Mr. Justice Miller, speaking for the court, said:

> "It is alleged that 150,000 acres of land lying on the north side of defendant's road, has been patented in lieu of lands found deficient on the south side of said road, and that the patents so issued are void. I am of opinion that the act of Congress did not intend to grant twenty sections per mile for the road, but ten sections per mile on each side of the road, that no right to take more on either side of the road than what amounted to ten sections per mile on that side, was conferred. If, for any reason, the required number of sections could not be found on one side, it was as in the case of similar deficiency in the twenty-mile limits of the other road, a loss which congress had made no provision to supply. *There existed therefore no power in the office of the Land Department to issue patents for lands on the north side for those not found on the south side.*" If the lands so patented can be identified I think that the government is entitled to have a declaration that as to these the patent conveys no title."

The case was appealed to the Supreme Court of the United States, and is found reported in the 98 U. S. (l. ed.) 198. Mr. Justice Field delivered the opinion of the court, on this subject he said:

> "It only remains to notice the further objections to the patents, that lands to the amount of 150,000 acres on the north side of the road is included in them in lieu of land deficient on the south side. It is true, the act of Congress contemplates that one-half of the

land granted should be taken on each side of the road; and that the department could not enlarge the quantity on one side to make up a deficiency on the other, but the answer to the objection as presented by the bill, either in its original form or as amended, is that it is not shown what this land was, and the patents can not be adjudged invalid as to any land not identified; so as to be capable of being separated; nor can any decision go against the company for its value without such identification. It is possible that the land to which the company was entitled is not so described in the patents that it can be separated from that which should not have been patented. If such be the fact, the government may be without remedy."

The case of the Southern Pacific R. R. Co. v. Smith and others, decided May 18, 1896, and reported in 74 Fed. Rept. p. 588, is on all fours with this case which we are now considering. The lands in controversy in that suit was patented to defendant Smith, and the Southern Pacific R. R. Co. claimed to be entitled to them by virtue of a congressional grant, and brought its suit to obtain a decree that the title conveyed by the patent is held in trust for it, and to compel the conveyance thereof to the complainant, and to enjoin the defendants from asserting any title to the lands.

The terms of the grant under which the complainant claims, are to be found in an act entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast (14 Stat. at L. p. 292). The third section of this act is an exact copy of the third section of the act of July 2, 1864, by which the Northern Pacific Railroad Company was incorporated. So far as applicable to

the present case, it was a grant of every alternate section of public land, not mineral, designated by odd numbers, to the amount of 10 alternate sections per mile on each side of the road to which the United States should have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time such route should be designated by a plat thereof, filed in the office of the commissioner of the general land office; and where, prior to that time, any of the sections or parts of sections should be granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, the act provided that other lands should "be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." It appears that the line of definite location of said road was fixed April 3, 1871, and on April 21, 1871, the commissioner of the general land office, by direction of the Secretary of the Interior withdrew the odd numbered sections of land within 30 miles of the railroad line from sale, location, pre-emption, or homestead entry, which order of withdrawal has ever since continued in force and effect, the railroad was thereafter constructed and fully equipped, and was accepted and approved.

On October 3, 1887, the complainant filed its indemnity list No. 25 in the proper land office within which district the lands in controversy were situated, describing the tracts in controversy as selected by the complainant in lieu of the lands lost to complainant, the indemnity list was in due form. The filing of the list of selection by the railroad company was prior to a settlement or entry of the lands by defendant Smith, his application for said

land having been made December 7, 1887, more than two months after the filing of the list of selection by the railroad company. When the railroad company filed its list of selections, the land in controversy was vacant and unappropriated, to which the United States had full title. The lands lost to the railroad company were situated on the north side of its road as definitely located and constructed, while the lieu lands were situated on the south side of said railroad line, defendant Smith made a preemption filing, which is similar to a timber and stone application.

From these facts the court said:

> "The lands in controversy are within 30 miles of, but more than 20 miles from, the road as definitely located and constructed, and, if vacant and unappropriated, were subject to be taken as authorized by the law, to make good losses sustained by the complainant within the primary limits of its grant. Complainant attempted to select these lands, which are situated on the south side of its road, on October 3, 1887, in lieu of lands situated on the north side thereof, within the primary limits of its grant, and which were lost to complainant, by including them in a list filed on that day in the proper local land office, in the form and accompanied by the certificates, affidavits, and fees required by law. This was prior to any attempt at settlement on, or entry of, the lands by the defendant Smith; his settlement, which was the basis of the patent subsequently issued to him, having been made December 7, 1887. * * *
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> The land in controversy being within the indemnity limits of the complainant's grant, and being, at

the time of the complainant's attempted selection of them, vacant and unappropriated, to which the United States had full title—and not falling within any of the exceptions of the grant, and the complainant having done all in its power to select them by filing in the proper office its claim to them in due form, accompanied by the affidavits and certificates required by law, and paying the proper fees, I think it clear that it is entitled to maintain the present bill unless it be, as contended on the part of the defendants, that indemnity lands on one side of the road can not be selected to make good losses sustained by the complainant on the other side. That they can not is, I think, in effect, held by the Supreme Court in the case of U. S. v. Burlington & Missouri River R. R. Co., 98 U. S. 334-342. On the authority of that case, a decree will be entered sustaining the plea and dismissing the bill."

The land involved in this controversy is the SW¼ of SE¼, Section 7, T. 54 N., R. 14 W. It was selected by the Northern Pacific Railroad Company as indemnity for lands in Sec. 11, T. 46 N., R. 16 W. The lost land is south of the line of road, while the selected land is north of said line of railroad. If the decision in the case of the Southern Pacific R. R. Co. v. Smith (supra) is good law, and it must be considered as such, as the Southern Pacific R. R. Co. appears to have acquiesced in the same, then under the rulings of that case and that of the Burlington case the complainant in this case should on this question alone be entitled to a decree of this court in his favor.

The act of Congress of July 2, 1864, creating the Northern Pacific Railroad Company and granting it aid for the purpose of the construction of a railroad from Lake Superior to Puget Sound under the provisions of Section 4 of said Act (13 Stat. at L. 368), enacted, "That whenever said 'Northern Pacific Railroad Company,' shall have 25 consecutive miles of any portion of said railroad and telegraph line ready for service completed, the president of the United States shall appoint three commissioners to examine the same, and if it shall appear that 25 consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the president of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situate opposite to and coterminous with, said completed section of said road; and, from time to time, whenever 25 additional consecutive miles shall have been constructed, completed and ready as aforesaid and verified by said commissioners to the president of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every 25 miles of said road is completed as aforesaid."

By this section, the Northern Pacific Railroad Company was divided into sections of 25 miles for adjustment, and the railroad company would have no claim or right to any land not embraced within the 25 miles of road that had not been certified and completed as specified in this provision of the act, and no legal selection of indemnity for lands lost within the place limits of its grant could be selected unless the lost land was within some completed section of the 25 miles, and the land selected in lieu thereof was also

within the some completed portion of the road. Can there be any question about the correctness of this proposition?

The Northern Pacific Railroad Company began the construction of its road in 1871, at a point in Section 1, Tp. 48 N., R. 17 W., upon the definite line of its route and continued westerly on that line. The map of the general route of said road was filed with the Commissioner of the eneral Land Office August 13, 1870. The red line on the map attached to this brief indicates the line of the general route of said road from Sec. 1, Tp. 48 N., R. 17 W., Minnesota to the Montreal river, the dividing line between Wisconsin and Michigan. On the 6th of July, 1882, the Northern Pacific Railroad Company filed its map of definite location of its road from Sec. 1, Tp. 48 N., R. 17 W., easterly to Ashland, Wisconsin. The definite line of location diverges materially from the line of general route. This line of definite location is indicated by the black line on the map in the record of this case (Record page 122). Sec. 1, Tp. 48, N., R. 17 W., is at a point called Thomson Junction. From that point to Bluff Creek in Superior, Wisconsin, at a point in Sec. 32, Tp. 49 N., R. 13 W., is 25 miles from Thomson Junction, on September 19, 1882, a map of this 25 miles of constructed road from Thomson Junction to Superior was filed in the Land Department, and a diagram showing the 20, 30 and 40-mile limits of the grant opposite said constructed road adjusted to the line of definite location was prepared by the Commissioner and filed in his office. The eastern terminus of the 25 miles from Thomson Junction is indicated by the line shaded yellow on the map (Record page 122). It was this 25 miles within which the Northern Pacific Railroad Company should have selected its lands on its list of selections October 17, 1883, at that date the eastern terminus of the

Northern Pacific Railroad Company was not further east than Sec. 32, Tp. 49 N., R. 13 W., which was at Superior. In 1887 the railroad was completed to Ashland, Wisconsin, and was certified as completed and accepted by the president of the United States in that year. All east of the line shaded yellow on the map (Record p. 122) which indicates the lateral limits eastwardly of the 25 miles from Thomson Junction and embraces all the lands in controversy in the litigation, has no foundation to base selections for indemnity for lands lost prior to October 17, 1883. I contend that as the eastern terminus of the road was on October 17, 1883, at Superior, there was therefore no authority to make a diagram embracing land east of that point, and all the lands embraced in this fan shape diagram which was at that time coterminous with the uncompleted portion of the road were not subject to selection, and therefore the lands selected at that date were not subject to selection, and thus the selections made at that date were void. If I am not correct in this legal proposition, I would like to have some one point out the error. If I am correct then all the lands falling within this fan shape diagram were not on October 17, 1883, subject to selection by the railroad company, and therefore it has no claim to the same.

It would therefore be incumbent upon one defending title to land claimed under such selection, to offer evidence showing the completion of the road, the appointment of commissioners, their reports and the acceptance of such report by the president of the United States. The filing of a selection list by the Northern Pacific Railroad Company within this land was shown to be selected in lieu of lands lost within the place limits of its grant, would be no evidence standing alone of the right of said company to select said land.

THE NORTHERN PACIFIC RAILWAY COMPANY IS NOT THE SUCCESSOR OF THE NORTHERN PACIFIC RAILROAD COMPANY.

There is no evidence in this case that the Northern Pacific Railway Company is the successor of the Northern Pacific Railroad Company. This is a fact to be established by evidence, not assumed to exist by reason of the assertion of the fact by the Northern Pacific Railway Company. The act of July 2, 1864, incorporating the Northern Pacific Railroad Company, was in the nature of an agreement, wherein the United States was one of the parties, and the Northern Pacific Railroad Company was the other. This agreement could not be changed or modified in any material respect without the consent of both parties. The grant to that company of 50,000,000 acres of the public domain, to aid in its construction, was on compliance with certain conditions on the part of the railroad company. The United States was not only interested in having this road constructed, but it was concerned in many other ways, for the performance of which, on the part of the railroad company, it reserved to itself the right at any time to add to, alter, amend, or repeal this act. That is expressed in Sec. 20 of said act, which reads as follows:

> "That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefit of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act."

The interest of the United States in this road was not to end on the completion of the same, there was no limit to the time when the rights of the government should cease; it was to continue as long as "grass grows, and water runs." It can not be said that the interest of the government in this road was ended, when the stock and bondholders of this road deemed it to their interest to change the terms and conditions of the original charter, without the consent of Congress.

After the completion of this railroad in 1887, a scheme for its sale was advocated. An agreement having been made with certain of its bondholders, and the Great Northern Railroad Co. required that the mortgages given by the Northern Pacific Railroad Company, to the Farmers Loan & Trust Co. should be foreclosed. It also contemplated placing the road in the hands of receivers. The action of the receivers caused trouble with its employes, which was designed to depreciate the value of the property of said road. To more perfectly carry out this scheme, it became necessary to resurrect the defunct Superior & St. Croix R. R. Co. and breathe into it the breath of life. This was done by the Legislature of Wisconsin April 15, 1895. This railroad was not only to purchase the personal property but also the land granted to the Northern Pacific Railroad Company, and after such purchase, these bondholders were to issue the bonds of this new road, in the amount, and for the purpose stated in the agreement between them, and the Great Northern Railroad Co. Such agreement is referred to in the case of Pearsall v. Great Northern Railroad Co., 161 U. S. (l. ed.) 838. The decision in that case (which was rendered March 30, 1896), upset this scheme, and another one was devised. On April 8, 1896, only six days after that decision, Senator Mitchell

fo Oregon, introduced in the senate the following joint resolution:

> "To facilitate the re-organization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding $2.50 per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action, control of its railroad to any corporation, company, person, or association of persons owning, operating, or controlling parallel or competing railroad; which was read the first and second time by unanimous consent and referred to the committee on the judiciary."

On April 21, 1896, the committee on the judiciary reported the joint resolution with amendments, and submitted a report, a part of which reads as follows:

> "The purpose of this proposed legislation may be stated in a few words. It has been made to appear to your committee that the land grant and other property of the Northern Pacific Railroad Company, all of which is covered by mortgage liens, will at a very early date be sold under foreclosure proceedings. This joint resolution, should it become a law, will enable the purchaser, at such foreclosure sale, upon filing in the office of the Secretary of the Interior a copy of the deed or deeds conveying to them said property, together with a certificate signed by a majority of them, setting forth the name adopted by them, the names, number and residence, respectively, of the directors of the proposed new company, and a copy of any plan of re-organization adopted

by said purchasers, or pursuant to which such purchase shall have been made, to re-organize under the name specified in such certificate, so that they, their associates, successors and assigns shall have and be inveted with all the estate, right, title and interest of such purchasers, in and to such railroad and property, and shall possess franchise, rights and powers, the same as the Northern Pacific Railroad Company now possesses; such new company to be subject to all the obligations and duties imposed by Congress upon the Northern Pacific Railroad Company. * * * The resolution also provides that nothing in it coutained shall be construed as making any addtiional grant of lands to such successor corporation, or as a waiver of any right of the United States now existing to enforce any forfeiture of lands heretofoer granted to the said Northern Pacific Railroad Company, or as in any manner affecting the vested rights of any settler or settlers on any of the lands heretofore granted to the Northern Pacific Railroad Co. or any purchaser or purchasers of such lands from said company. The right to alter, amend, or repeal this resolution is also by express terms reserved to congress."

On January 23, 1897, the joint resolution came before the senate for action, objection being made to its consideration, the joint resolution was not acted upon, nothing further was done by Congress.

On July 1, 1896, the corporate name of the Superior & St. Croix Railroad Co. was changed to "Northern Pacific Railway Co.," which name was adopted as the corporate name of the Superior & St. Croix Railroad Co.

These proceedings in the senate abundantly show that those interested in this scheme to dispose of the property and effects of the Northern Pacific Railroad Company, realized that they must in some way obtain the consent of Congress, before they could legally take action, when, however, that consent could not be had, they proceeded on the theory that title to this property would pass without the assent of Congress. The change in the name of the Superior & St. Croix Railroad Company to that of the Northern Pacific Railway Co., and the purchase of the property, real and personal, of the Northern Pacific Railroad Company, had, they believed, the effect to create that company the successor of the Northern Pacific Railroad Company, whether Congress was disposed to consent to the change or not.

If the Northern Pacific Railway Company is the successor of the Northern Pacific Railroad Company, then that company must be the predecessor of the Northern Pacific Railway Company. This we know is not the fact, the Northern Pacific Railroad Co. exists today. Congress could add to, alter, amend or repeal the act of 1864, if it should repeal it, the lands granted to the company and still undisposed of would return to the public domain. With such authority still existing, which we all must admit, how can the Northern Pacific Railway Company be the successor of a living corporation.

The defendants rely upon a decision of the Secretary of the Interior (29 L. D. 316) in a case of the Northern Pacific Railway Co., under the act of July 1, 1898, which holds that upon the examination of copies of certain deeds, it is found that the Northern Pacific Railway Co. is the successor of the Northern Pacific Railroad Co and that finding the defendants claim is conclusive; that the Secre-

tary found from this evidence that the Northern Pacific Railway Company was the successor of the Northern Pacific Railroad Co. is no more astonishing than the assertion on the part of the defendants that such finding is conclusive. The law which the Secretary was in that case construing, has an express provision with reference to this matter of succession. It was a legal question, not a matter of fact that had to be decided. The act of July 1, 1898, provides:

> "That nothing herein contained shall be construed as intended, or having the effect, to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company, in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company, in the courts of the United States, BUT THE LEGAL QUESTION whether the said Northern Pacific Co. is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act."

We raise the question of successorship here, are we bound by the decision of the Secretary, as contended by the defendants the proposition is absurd.

The Northern Pacific Railway Co., in compliance with the laws of Wisconsin, under which it was organized, made its first report to the Railroad Commissioner of that state for 10 months ending June 30, 1897. This report was sworn to by the president and treasurer of said company, as being a complete and correct statement, the same was

filed in the office of said commissioner, a copy of which is in evidence in this case.

To certain questions asked, the following answers were given:

1st.—Name of the common carrier making this report? Answer—Northern Pacific Railway Company.

2d.—Date of organization? Answer—1870.

3d.—Under laws of what Government, State or Territory organized? If more than one, name all, give reference to each statute, and all amendments thereof? Answer—Wisconsin; special act approved March 15, 1870; amended January 26, 1871; March 6, 1871, and April 15, 1895; former title Superior & St. Croix Railroad Company, changed to present name by resolution of stockholders and directors in July, 1896.

4th.—If a consolidated company, name the constituent companies? Give reference to charter of each and all amendments of same? Answer—Not a consolidated company.

Without the power conferred by the Joint Resolution of May 31, 1870, the Northern Pacific Railroad Company, would have had no authority to issue its bonds and secure the payment of the same by a mortgage "on its property and rights of property of all descriptions, real, personal and mixed, including its franchise as a corporation." Did those words confer power to convey to its bondholders by way of mortgage, and on foreclosure to transfer to the purchaser an absolute title to all the property of the company, also its franchises, including the franchise of becoming and

being a corporation, so that the purchaser would have the right to organize as such as successor to and substitute for the Northern Pacific Railroad Comapny, precisely as if the act of July 2, 1864, had named them as corporators, and endowed them with corporate faculty. If so, it would involve an assumption of the Northern Pacific Company's obligations as well as an acquisition of its privileges and exemptions. The franchise of being a corporation can not be transferred by any corporate body of its own will, as it is not a subject of sale and transfer.

In the case of the Memphis, etc., R. R. Co. v. Berry, 112 U. S. (l. ed.) 840, in which questions of similar character arose, the court said:

> "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the sub substantial rights intended to be secured. They acquired the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators; while the power and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises. If, in the

present instance, we suppose that a mortgage and sale of the charter of the railroad company created a new corporation, what has become of the old one? If it abides for the purpose of responding to the obligations not satisfied by the sale, or of owning property not covered by the mortgage or embraced in the sale, as it may well do, and as it must if such debts or property exist, then there will be two corporations coexisting under the same charter. For after an act of disposition which separates the franchise to maintain a railroad and make profit from its use, from the franchise of being a corporation, though a judgment of dissolution may be authorized, yet, until there be such judgment the rights of the corporators and of third persons may require that the corporation be considered as still existing."

The corporation created by the act of July 2, 1864, has never been dissolved and, for all purposes not covered by the mortgage, still maintains an existence as a corporate body, capable of contracting, and of suing and being sued. If this be so, how can the Northern Pacific Railway Company be its successor.

The powers of corporations organized under legislative statutes, are such and such only as those statutes confer. The charter is the measure of its powers, and the enumeration of these powers implies the exclusion of all others. In the construction of such a statute every presumption is against it.

Referring again to Sec. 10 of the act of July 2, 186$\frac{4}{}$, we find this provision, "No mortgage or construction bonds, shall ever be issued by said company on said road; nor mortgage, or lien made in any way, except by the con-

sent of the Congress of the United States." The Joint Resolution of May 31, 1870, authorized the company to "issue its bonds to aid in the construction and equipment of its road and to secure the same by mortgage."

The prohibition with respect to "liens made in any way" was still retained, Congress never consented that liens other than mortgage liens should ever be placed upon the property. In Thomas v. West Jersey R. R. Co., 101 U. S. (l. ed.) 950, the court declared the general principle on this subject to be:

> "That where a corporation like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, WITHOUT THE CONSENT OF THE STATE, to transfer to others the rights and powers conferred by the charter, and relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."

In York v. Winans, 58 U. S. (l. ed.) 27, in reply to the argument made by the appellant, that the duties imposed upon it by the charter, are fulfilled by the construction of the road, and that by the alienation of its rights to use, and its power to control and supervise it, they would avoid further responsibility, the court said:

> "But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to

provide the facilities to communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation can not absolve itself from the performance of its obligations WITHOUT THE CONSENT OF THE LEGISLATURE."

It is not claimed that Congress ever gave its consent that the lands within the Northern Pacific Railroad Company's grant lying east of the Missouri river, might be sold to satisfy liens by way of judgments against the company. To hold that such sale can be made without the consent of Congress, and by such sale pass a legal title to the purchaser, is to hold that any act done without authority, makes all its parts valid and the more it is done when forbidden by law the stronger the claim t oits enforcements in the courts.

It may be well to note in passing, that the plaintiff claims, that the power to mortgage conferred upon the company by the Joint Resolution, was exhausted when the first mortgage was given, which was in 1870, when the work of construction was begun. This mortgage was paid. The road was built through Minnesota long before the other mortgages were given, and therefore could not have been executed to secure the payment of bonds issued for the construction and equipment of that portion of the road. Although the lands east of the Missouri river were not effected by or sold on the foreclosure of any mortgage, the order of sequestration was based largely on the deficiency arising from the sale under the decree of foreclosure of the several mortgages that had been subsequently given—all

these subsequent mortgages were executed and delivered without authority of law and were void—and the sale of the real and personal property of the Northern Pacific Railroad Company for that reason conveyed no title to the real and personal property which was the subject of the sale, and was void and of no effect.

In the case of the East Tennessee, etc., R. R. Co. v. Frazier, 139 (l. ed.) 196, the court said:

> "Whatever special rights of mortgage were given by the act of 1847, were exhausted. That special right was to increase its capital by the issue of bonds secured by mortgage to a sum sufficient to complete its road, and stock it with everything to give it full operation. It appears that the road authorized by this charter was completed, equipped and in full operation more than 25 years before the mortgage of 1881, and long before the consolidation of 1869. OF COURSE, WHEN A CHARTER POWER IS ONCE EXHAUSTED IT IS IN RESPECT TO FURTHER CONTRACTS AN DRIGHTS, AS THOUGH IT HAD NEVER BEEN GRANTED."

THE TITLE TO THIS LAND, AT THE DATE OF SALE BY THE SPECIAL MASTER UNDER THE ORDER OF THE COURT, WAS IN THE UNITED STATES, IT WAS NOT AFFECTED BY SUCH PROCEEDINGS.

Sec. 10 of the act of July 2, 1864, expressly prohibited the Northern Pacific Railroad Company "from issuing any mortgage or construction bonds on said road, or

lien made in any way, except by the consent of the Congress of the United States."

On May 31, 1870, Congress passed a joint resolution, which provided among other things:

> "That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and description, real, personal and mixed, including its franchise as a corporation. * * * And if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity, or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof to the highest and best bidder."

The land in controversy was not affected by a sale under any mortgage but on an order of sequestration. The joint resolution had only reference to a mortgage, the consent of Congress required to be given by Section 10 of the act of July 2, 1864, referred only to a mortgage, but not to "liens made in any way" by the company upon its property. Congress had a right to make this condition, and the acceptance of this provision by the Northern Pacific Railroad Co. made it effective and binding upon it. This land was sold on a lien created by the court, without the consent of Congress, and the sale of the land did not affect the title to

the same. This land was within the second indemnity limits and at the date of the pretended sale the title to the same was in the United States. The order of sale attempts to carry out the mode and manner of sale as if the lands had been patented to the Northern Pacific Railroad Company, or had been selected by that company and the selections approved by the Secretary of the Interior, but when it came to the sale of lands the selection of which had not been approved, the sale was made in gross, not by sections or subdivisions of sections. It was simply the sale of lands, the legal and equitable title of which was then in the United States. No title could pass to such lands, whatever their situation might be in the future. There was an entire want of authority to dispose of these lands in the manner in which they were sold, and therefore no title passed by such sale. The purpose of this provision in Sec. 10 of the act of July 2, 1864, was at all times to keep the granted lands free from liens for the benefit of the stockholders of the company, and place the land grant beyond the reach of those that might at times have charge of its affairs, and be inclined to exploit the same for their own selfish interest. If the grant was beyond the reach of those that were connected with the management of the Northern Pacific Railroad Co., if the company were prohibited from creating a legal liability in the shape of a lien, it is not clear how such a lien could be made effective by an order of the court in a suit in which neither the United States, nor the stockholders of the company were parties. This provision is the same as if Congress had stated that the land embraced in this grant were exempt from sale under execution of decree. The United States as well as the stockholders are directly interested in the enforcement of this provision. So is the complainant who claims under an

interest in these lands transferred to his grantor by the United States.

On April 27, 1899, there was a decree of the court made and entered in the cause in which the Farmers' Loan & Trust Company were complainant and the Northern Pacific Railroad Company and others were defendants, (Record page 145), in which the prayer of the petitioners being granted it was ordered that all the lands granted by Congress to aid in the construction and equipment of the Northern Pacific Railroad Company, and all the rights of said defendant under the several land grants made to it by Congress in any lands lying within the State of Minnesota, should be sold, the lands to be sold were the lands for which letters patent have been issued to the said Northern Pacific Railroad Company and the right to receive lands for which patents have not issued but which have been selected by and certified to said company these should be sold in single sections or subdivisions.

This decree was vacated by a decree May 25, 1899, (Record page 149), and on that date another decree was made and entered, insofar as the manner and mode of selling these lands were considered it was in the same manner as the decree of April 27, 1899. The special master who disposed of this land under the decree of the court dated May 25, 1899, made his report of his doings (Record page 159), and the manner and mode in which the sale was made, and refers to A. 2, which appears in the record of the case (Record page 163), which the special master states the lands sold in schedule A. 2, were offered for sale and sold in single sections or subdivisions thereof. On September 16, 1899, it appearing to the court from the report of the special master "that he had fully complied with the direc-

tions in said decree as to the sale of said lands," the sale was confirmed.

April 27, 1899. Decree, (Record page 216):

> "All of said lands for which letters patent have been issued to said defendant, the Northern Pacific Railroad Company,, and the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said company, shall be sold in single sections or sub-divisions thereof at the the following places."

May 25, 1899, record 223, another decree was entered upon which the sale of this property was made, states the manner in which this property was to be sold.

The order is the same as in the decree of April 27, 1899.

August 24, 1899, record 233-237, report of special master to the court, on page 237 of the record he says, speaking of the lands sold in St. Louis County:

> "Then and there, pursuant to said decrees offered at public sale the lands described in Schedule A2 hereunto annexed and made a part hereof, except those represented by "item number 390" in said schedule which said offers of said lands were in single sections or subdivisions thereof as represented by each item number.

It is claimed by the complainant that the sale of this land under the decree of the court was void.

It appears in evidence from the report of the special master that his authority to dispose of this land was conferred upon him by a decree of the court, which required

the special master to sell these lands at public auction, and what lands were to be sold and the manner in which they should be sold was specifically mentioned in said decree.

He was to offer for sale:

1st. All the said lands for which letters patent have issued to said defendant, Northern Pacific Railroad Company.

2d. And the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said company.

These two classes of land were to be sold in single sections or subdivisions.

This was the authority conferred upon the special master and the validity of his sale depended upon his conforming thereto.

The only lands that he was authorized to sell, which was included in these two classes, were lands that had been patented to the Northern Pacific Railroad, and lands that had been selected by said company, and its selections had been approved by the Secretary of the Interior.

He was not authorized to sell any lands that were not thus situated.

He was, however, authorized to sell all other lands in which the Northern Pacific Railroad Company claimed an interest, which would embrace lands not included within the two classes of land above referred to and that have not been patented to the railroad company, or its selections had not been approved and certified to the company.

All lands thus situated were to be placed in a separate class and sold in a different manner, to-wit, in a lump.

The sale of these lands was made, according to the report of the special master, on the 17th day of July, 1899, and his report to the court of his proceeding under said decree, and his manner of executing the same, was made August 24, 1899. In said report he says:

> "That I attended at the time and place of sale within said County of St. Louis, specified in said notice, to-wit, on the 17th day of July, 1899, at 4 o'clock p. m., at the Court House in Duluth, St. Louis County, in said State of Minnesota, and then and there, pursuant to said decree, offered at public sale the lands described in Schedule A2, hereunto annexed and made a part hereof, excepting those represented by 'Item number' 390, in said schedule, which said offer of said lands were in single sections or subdivisions thereof as represented by said 'Item number' in said schedule except said number 390."

As the report does not describe the lands sold, but refers to Schedule A2, that schedule or what is claimed by the defendants to be a copy is offered in evidence and made defendants Exhibit 10 (Record pp. 163-175), from which it appears that this land in controversy is therein designated as "Item number 151" (Record 168), and was sold as land that had either been patented to the Northern Pacific Railroad Company, or selected by and certified to said company.

This land did not belong to either of these two classes, and for that reason the special master had no authority to sell the same under the decree.

It appears (Record p. 139) that the United States had on December 19, 1898, sold this land in controversy to

Richard B. Jones. It also appears (Record p. 135 Complainants Exhibit 0), that the selection of this land by the Northern Pacific Railway Company was not approved by the Secretary of the Interior until October 17, 1905.

From this it would appear that this land was not of the character that the special master was authorized to sell in the manner which he did do, the decree conferred upon him his only authority, he had no right to dispose of this land otherwise.

As said in Williamson v. Berry, 8 Howard (l. ed.) 1171:

> "In any sale under a decree or order in chancery, the purchaser, before he pays his money must not only satisfy himself that the title to the property sold is good, but he must take care that the sale has been made according to the decree or order. If he takes under an imperfect sale, he must abide the consequences."

In Milwaukee & Minnesota R. R. Co. v. Soutter, 69 U. S. (l. ed.) 886-898, Mr. Justice Miller, speaking for the Court said:

> It is too clear for argument that a sale by the marshal unauthorized by the decree, is without validity. Does the order confirming the sale made it valid? Upon principle, the question is by no means free from difficulty, we are clear that a sale without a decree to sustain it would be a nullity, and we doubt if the court can make it valid by a mere general order of confirmation."

In Gray v. Brignardella, 68 U. S. (l. ed.) 693-698, the court said:

> "Purchasers at a judicial sale are protected, when the power to make the sale is expressly given, not otherwise. It is only when they buy on the faith of an order of the court which clearly authorizes the act to be done, that the shield of the law is thrown around them. An officer of the court may erroneously suppose that the power to sell is given by a decree; yet, if he does sell, his act is without authority of law and is void."

When a decree specifies the manner in which it must be exercised, it must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise. There can not in this case be any presumptions indulged in to sustain the action of the special master and uphold this sale, for he recites in his report the manner in which he sold the property, and from the recitals it appears that he disregarded the order or decree of the court and did not conform to its directions. That presumptions are not indulged to sustain proceedings of this character are made manifest. Presumptions are indulged to supply the place of that which is not apparent, not to give a new character to that which is seen to be defective, every deed executed under a power must refer to the power. As an independent instrument of the holder of the power it would not convey the interest intended, but if the manner in which the power is exercised is recited, it being proper matter for recital, then the recital is evidence not against a stranger, but against the grantee and parties claiming under him. French v. Edward, 80 U. S. (l. ed.) 702.

The special master recited in his report the manner in which he had exercised the power conferred upon him

by the order or decree, making part of his report schedule A2, and referring to the lands he had sold by items, mentioned in said schedule, among which we find the land in controversy; the Northern Pacific Railway Company, by accepting the conveyance with this solemn declaration of the officer as to the manner in which his power was exercised, would be estopped from denying that the fact was as recited.

If while acting under a valid decree, an officer sells lands not embraced therein, his act is, as to such lands, obviously without any legal support.

Ludlow v. Park, 4 Ohio 5.
Green v. Holt, 76 Mo. 677.

In conducting the sale, the master acts as the agent of the law, his powers as such being derived from the decree, and the order or decree must be strictly pursued. The purchaser is bound by the presumption to know the limits of the master's authority as delegated to him by the decree and purchasing when he transgressed such special authority, he does so at his peril. This is in accordance with the general principles applicable to the law of agency.

Manifestly when the decree requires that the master make the sale under the order of the court, he is imperatively controlled by the requirements thereof, and a sale made in contravention of the decree is ineffectual to bar the title from the judgment debtor to the ostensible purchaser.

Sec. 310 Klebers void Judicial Sales.

Accordingly, in theory of law in a strictly judicial sale the court itself is properly the vendor, and the sale,

insofar as the owner of the property is concerned is an involuntary one. Sec. 2.

From its very nature, a judicial sale is of necessity the result of judicial proceedings, and the order or decree upon which the sale is founded, must expressly direct that the property involved, whether real or personal, be sold, for without such an order there can be no judicial sale within the strict meaning of the term. Sec. 3.

A sheriff, master or other officer, selling property under a process, decree or judgment of the court cannot make a valid agreement with the purchaser to convey any other estate than such as the decree or judgment will warrant.

Ryan v. Dox, 25 Barb. 440.

A sale of land under judgment must be made in the manner prescribed in the judgment.

Bethel v. Bethel, 69 Ky. (6 Brush 65-99). American Dec. 655.

A sale of property in any other manner than that prescribed by law vests no title in the vendee.

Gable v. Martin, 2 Mass. (1 Howard) 558.

But we do not mean to intimate that in any case a sale by a master, or master in chancery, can be valid, when there is no decree to support it, citing Shriver v. Lynn, 2 Howard 43.

Milwaukee and Minn. R. R. v. Soutter, 69 U. S. 898.

Early in 1878 a bill was introduced in Congress to secure to this reorganized company confirmation of title to the property and to all the corporate powers and franchises, "including the franchise to be a corporation," originally conferred upon the Northern Pacific Railroad Company by its federal charter of 1864.

That bill failed of passage. It was never again introduced. A record of the proceeding will be found in the Congressional Record of the 45th Congress, Volume 7, part 3, pages 2690, etc.

THE NORTHERN PACIFIC RAILWAY COMPANY WAS NOT AUTHORIZED BY ITS CHARTER TO PURCHASE, HOLD OR CONVEY THESE LANDS.

The rights of the Northern Pacific Railway Company were conferred upon it by an act of the state of Wisconsin dated March 15, 1870, by which was incorporated the Superior and St. Croix Railroad Company. This act was in effect the same as the one under consideration in the case of Case v. Kelly, 133 U. S. (l. ed.) 513, in which it was held that a railroad had no authority to deal in any lands except only such as was necessary in the conduct of its business as a railroad. The decision in that case, would be the law in this, provided the amendments to the articles of incorporation of the Superior & St. Croix Railroad Company, adopted by the Legislature of the State of Wisconsin, April 15, 1895, were void under the constitution of that state, and the complainant was authorized to raise that objection. The act with the amendments are given in full. (See exhibit "D" attached to the bill of complaint).

It is claimed that Section 8, as amended under which the authority is conferred is void, as controvening not only Section 18 of Article 4, of the constitution of the State of Wisconsin, but of Section 31 of Article 4 of the same instrument.

Section 18, Article 4 of the constitution, is as follows:

> "No private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in the title."

The title of the act was "To incorporate the Superior and St. Croix Railroad Company." The title of the act as amended April 15, 1895, is:

> To amend Chapter 326 of the private and local laws of 1870, entitled "An Act to incorporate the Superior & St. Croix Railroad Company," and Chapter 328, of the private and local laws of 1871, entitled "An Act to amend Sec. 2, Chapter 326, of the private and local laws of 1870, approved March 15, 1870, entitled "An Act to incorporate the Superior & St. Croix Railroad Company."

The title was plain and simple, "To incorporate the Superior & St. Croix Railroad Company." Anything that was germane to this title was authorized under it. The original charter of the Superior & St. Croix Railroad Company was for the construction of a railroad entirely within the State of Wisconsin, and it was authorized to acquire real estate for its right-of-way and for lands that were necessary for its use as such railroad. By Section 8, as amended, the company was authorized to hold and dispose of any lands that the Superior & St. Croix Railroad Company might acquire, by its purchase or otherwise, in any

territory through or in which it shall acquire in any manner, and operate any railroad or railroads where ever such lands may be situated. By this amendment the act has two subjects. First, to incorporate the Superior & St. Croix Railroad Company; second, to buy, sell, or otherwise dispose of, lands within any state through which it may operate any railroad. These two subjects have no connection with each other.

Would we reasonably anticipate finding in the body of an act, the title of which was to incorporate the Superior & St. Croix Railroad Company, a clause giving authority to said corporation to purchase, hold, or dispose of lands without limit? Is such a provision germaine to such a title? The construction of a railroad, and the purchasing and disposing of lands have no rational connection with each other. The only subject mentioned in the title is the incorporation of the Superior & St. Croix Railroad Company. Such an act might contain any provision necessary to carry out that purpose. An act to incorporate the Superior & St. Croix Railroad Company, would apprise neither the legislature, nor the public, that it covered provisions under which an unlimited amount of lands could be purchased by that corporation. The reading of such a title would at once induce the conclusion that the various provisions of the act related alone to the incorporation of said railroad, and the act itself must, therefore, be confined to that subject. The constitutional provision is violated if an act is amended so as to embrace a purpose outside of its title. Whatever amendments are made must be amendments to the organic law, and not independent provisions relating to something else. The constitution has made the title, the index to the legislative intent, as to what shall have operation. The purpose of the adoption

of such a provision in the constitution of the state was that every measure presented for consideration should stand upon its own merits, and that the leigslature should be fairly notified of the design of the act when required to pass upon it. Has the added provision any necessary connection with the subject stated i nthe title, or any connection with the subject treated in the act? By no reasonable construction can the purpose of buying and selling lands be said to be embraced within the title to incorporate the Superior & St. Croix Railroad Company. The section of the constitution prohibiting legislation of this character is a wise and wholesome one, intended to prevent legislators from being entrapped into a careless passage of sections and clauses in bills of which the title give no intimation. The propriety of such an inhibition is apparent to all, and it must be observed and protected by the courts. Titles to legislative acts by reason of these constitutional provisions possess very great importance. It not only requires that the purpose of the law should be correctly indicated, but it absolutely makes the title of the act control, and excludes everything from the effect and operation as law which is incorporated in the body of the act, but is not within the purpose indicated by the title.

Is it probable that the Legislature of Wisconsin, having under consideration the amendments to incorporate the Superior & St. Croix Railroad Company, if it had supposed or been informed that by the adoption of said amendments it was clothing said railroad company with the power to deal in lands, not necessary for its use, that it was conferring upon it a power without limitation, that such provisions would have become a law. The title is not broad but narrow, not general but specific. Under such a title no one would infer, and nobody was bound to imagine

that such vast powers had been conferred upon this corporation to deal in lands in the manner claimed by said company, a provision as to which the title not only did not relate, but by its narrow terms affirmatively, and positively excluded.

Milwaukee Co. v. Isenrig, 109 Wis. 19.
Diana Shooting Club v. Lamoreux, 114 Wis. 44.

Section 31, Article 4 of the constitution of the State of Wisconsin is as follows:

"The Legislature is prohibited from enacting any special or private laws in the following cases: First, for changing the name of persons, or constituting one person the heir at law of another; second, for laying out, opening or altering highways, except in cases of state roads extending into more than one county, and military roads, to aid in the construction of which lands may be granted by Congress; third, for authorizing persons to keep ferries across streams, at points wholly within this state; fourth, for authorizing the sale or mortgage of real or personal property of minors, or others under disability; fifth, for locating or changing any county seat; sixth, for assessment or collection of taxes, or for extending the time for the collection thereof; seventh, for granting corporate powers or privileges, except to cities; eighth, for authorizing the apportionment of any part of the school fund; ninth, for incorporating any town or village, or to amend the charter thereof."

It is contended by the complainant, that under the seventh subdivision of Section 31, the amendments to the

charter incorporating the Superior & St. Croix Railroad Company, adopted by the Legislature on April 15, 1895, are void. It can not be denied that these amendments grant corporate power as well as privileges, and that to a very remarkable extent. The original act of March 15, 1870, contained 22 sections. Of these 12 sections were amended, 7 repealed and 6 new sections added. Under the guise of amendments a new act to incorporate this company was made. New powers, and new privileges were conferred upon it, and these of a very extraordinary character. The act under consideration not only authorized and empowered the "Superior & St. Croix Railroad Company" to construct a railroad within the boundary of the State of Wisconsin, but to extend the construction of said railroad into the several states, and into the dominion of Canada. It could not only build a railroad, but it was authorized to purchase any railroad, or railroads, to buy stock and bonds of any railroad. It may become a dealer in lands, buy and sell the same in the states through which its railroad may pass, and all these powers are conferred upon it, under the act, the title to which is to incorporate the "Superior & St. Croix Railroad Company." That there was no intention by these amendments to carry out the original purpose of the act is apparent by the subsequent action of this company. From March 15, 1870, to July 6, 1896, the Superior & St. Croix Railroad Company, if it had any existence at all, such existence was on paper alone. Not a mile of this road had been constructed, there had been no money raised or effort made towards the construction of this road. The incorporation of the Superior & St. Croix Railroad Company up to July 6, 1896, was only a float, and its only market value was the use it was put to on that date by changing its name to the Northern Pacific Railway Com-

pany, and within six months after this transformation, it was the owner of more than 5,000 miles of tract, and millions of acres of land, with stock and bonds issued by it for more than $300,000,000 without a mile of the road constructed on the line designated in the original act, and all this vast property held under an act to incorporate the Superior & St. Croix Railroad Company. It seems to me that if the amendments to this act adopted April 15, 1895, conferred the powers and privileges to carry on the business in this manner, such powers and privileges clearly fall within the condemnation of the seventh clause of Sec. 31, Article 4 of the contstitution of the State of Wisconsin, and are therefore void.

In the case of Attorney General v. Superior & St. Croix Railroad Company, 93 Wis. 613, the court in speaking of the amendments to the articles of incorporation of this company, said:

> "Whether the provisions of Ch. 244, Laws of 1895, which greatly enlarge the existing rights, privileges and franchises of the company, and confer upon it others of a varied and most comprehensive and highly important character, are void, as being in violation of the seventh clause of the constitutional amendment of 1871 (Art. 4, Sec. 31), forbidding the enactment of "any special or private laws for granting corporate powers or privileges, except to cities," is not presented by the information, so as to become a proper subject for judicial determination and we neither express nor intimate any opinion in respect to these portions of the act."

The matter before the court was a motion by the Attorney General for leave to file an information in the nature

of a quo warranto, the court, however, was of the opinion that so far as the question presented, that the amendments were in conflict with the provision of the constitution referred to, the evidence did not show that the company had acted upon them, but in the case now before the court, those facts are made to appear, by the purchase of the land in controversy by this company and the sale of the same to the defendants in this case. If the act, as amended authorized the Northern Pacific Railway Company to purchase and dispose of lands acquired, it still remains simply a law of the State of Wisconsin. It has no force or effect in the State of Minnesota.

A corporation is not a citizen (only in a qualified sense) of the state in which it is created. It can only act in another state on such conditions as the latter state may see fit to impose. Corporate existence is by universal law regarded as a franchise which can never exist except by positive authority within the state which granted or confirmed its franchise. The strictly legal existence by force of obligatory law of a corporation is confined to the state which created it, and endowed it with its powers, capacities and rights, which it can only exercise in another state by the permission of the legislative power thereof, and when it assumes to act in such state, the enjoyment and exercise of such right must conform to the law or settled policy of that state not prejudicial to its interest, or those of its citizens. The power to take land in a corporate capacity is itself a franchise, the title passes by succession, the changes by death or otherwise among the corporators does not affect its disposition, as it does in private holdings.

The question whether a railroad company organized under the laws of Wisconsin is competent to take title to lands in the State of Minnesota, does not wholly depend

upon the laws of its creation; the laws and public policy of the State of Minnesota, as indicated by its legislature, are material, and important factors to be considered. The Northern Pacific Railway Company owes its existence to the laws of the State of Wisconsin, and the powers and capacities expressed or implied, are such as conferred upon it by its charter. The question therefore is, first, whether the Northern Pacific Railway Company was clothed with authority to purchase these lands within the State of Minnesota, and if so, second, whether the laws or settled policy of Minnesota allowed such purchase. The laws of the State of Minnesota prohibit corporations from holding lands except to a limited extent, Section 5877, General Stat. 1894, as amended by Ch. 129, Laws of 1899, provides:

> "That no corporation other than those organized for the construction or operation of railroads, canals or turnpikes, shall acquire, hold or own over 5,000 acres of land so hereafter acquired in this state; and no railroad, canal or turnpike corporation shall hereafter acquire, hold or own land so hereafter acquired in this state other than may be necessary for the proper operation of its railroad, canal or turnpike, except such lands as may have been granted it it by act of Congress, or the Legislature of this state."

This statute indicates the policy of the state in this regard. Whatever may have been the capacity of the Northern Pacific Railway Company to take, hold and convey lands within the State of Wisconsin, the laws of Minnesota forbids that company, and all other corporation, to take, hold or convey lands in the State of Minnesota, except such as may be necessary for the proper operation of

its road. The complainant, therefore, contends that the title to this land in controversy did not pass to the Northern Pacific Railway Company, and that such road could not transfer any valid title to the same to the defendants.

It may be urged that the limitation upon the power of a corporation to receive land is one which concerns the state alone, that the title to such lands in a corporation can only be defeated by a proceeding in the nature of a quo warranto on behalf of the state.

The rule universally applied in determining the effect of conveyances is, that if the thing granted was not in the grantor at the time of the grant, no estate passes to the grantee. A patent is but evidence of the grant, and the officer who issues it acts ministerially, and not judicially, if he had no authority to grant it, or another party had a higher equity, and should have received the patent courts in a proper action will pronounce it void. A court might hesitate to declare the title to land already received and in the possession of the defendant void, for the reason that their grantors had no authority to purchase such land, and were forbidden to do so by their charter, but if the title conveyed to their grantor was absolutely void, for want of authority to grant it, or their grantor to receive it, the title would be held void even in a court of law.

In reference to the patenting of these lands to the Northern Pacific Railway Company, the question is not that of "ultra viras," but of the power and authority of the government to convey, and the railroad company to receive.

There must be in all grants first a grantor with power to convey, and second a grantee with authority to receive. I contend that there was wanting in this case

both a grantor and a grantee. Where the officer has no authority in law to grant, such grant is void, for a public officer can bind the government only within the scope of his lawful authority (U. S. v. Stone, 69 U. S. 765). If the officer has authority to grant, but the grantee has no authority to receive, the grant is void for the same reason. It is not a question of "ultra vires" for that can only occur where the grantee has exceeded its powers, but here is an entire want of power to receive the grant. In such cases the grant is held absolutely void, not voidable.

The existence of a grantee authorized to take the grant is absolutely essential to every grant, and the grant to a fictitious person or corporation is a mere nullity, and can in no manner affect the title of the lands purporting to be granted.

Thomas vs. Wyatt, 31 Mo. 188;
Doughett vs. Stinson, 63 Mo. 268;
U. S. vs. S. C. C. & T. Co., 18 Fed, Rep. 273-276;
Russel vs. Topping, 5 McLean, 194-202;
Harriman vs. Loutham, 10 Ind., 190;
Devlin on Deeds, Sec. 191.

It is settled that where it is doubtful whether a corporation has exceeded its powers or abused its corporate franchise in the acquisition of title to land, strangers cannot litigate the question, at least after the title has vested. The question then is one between the state and the corporation.

But while this is true, it is equally well settled that where the acquisition is prohibited, a grant to such corporation would be absolutely void and would not pass the title.

Russel vs. Topping, 5 McLean, 194;
Harriman vs. Southam, 16 Ind. 190;
Chataugua County Bank vs. Risley, 14 Denio, 480;
Michigan Bank vs. Niles, 1 Doug. 401;
People vs. Bank of Oakland Co., 4 Denio, 280.

The question presented is not one of doubt as to whether or not it has exceeded its powers or abused its corporate franchise.

It is not therefore to be governed by those decisions where the question of the right of the corporation to take lands is a question of doubt which the corporation has a right to have passed upon by the courts.

Further in the case at bar, the question is not that of divesting from a corporation a vested title, but whether or not any title ever vested in the corporation.

In conclusion we aske the careful consideration of the court to the following propositions:

1st.—That the Northern Pacific Railroad Company, under the proviso in Sec. 3 of the act of July 2, 1864, was not entitled to any lands that were included within the act of May 5, 1864, such act being prior in date to the Northern Pacific Railroad Company, and should be deducted from the amount of lands granted to said Northern Pacific Railroad Company, and charged to the same.

2d.—If such should be determined by the court not to be the law, we then insist that after the definite location of the Lake Superior & Mississippi Railroad, who was the beneficiary of the grant of May 5, 1864, the lands with the

place and indemnity limits of the Lake Superior & Mississippi Railroad, would by relation, be considered from the date of the grant May 5, 1864, this would be prior to the date of the Northern Pacific Railroad Company's grant, and if the land claimed to have been lost by reason of its being patented for the benefit of the Lake Superior & Mississippi Railroad Company, the lien land should have been selected within the first indemnity limits, a selection of land within the second indemnity limits could not be sustained.

3d.—The cancellation of the list of selections made by the Northern Pacific Railroad Company, filed October 17, 1883, in the local office and the land covered by the same being restored to the public domain, and while the land was thus situate Richard B. Jones made application to purchase the land in controversy, and his application accepted, the proof as required by law made, the price for the land paid, and the usual receipt for the same was given, after all this had been done Jones would have a vested right in the land which could not be divested by the land department without a hearing.

4th.—That Richard B. Jones, on December 17, 1897, filed his application to purchase the land in controversy, his application having been accepted by the local officers, proof made as the law requires, the money paid for the land and the usual receipt issued, he came within the provisions of the act of Congress dated July 1, 1898, and the claim, if he so desired, should have been adjusted under that act.

5th.—That the land selected in lieu of the land claimed to have been lost to the Northern Pacific Railroad grant, within the second indemnity of its grant, was vacant public land, and was such December 17, 1897, when Richard B.

Jones applied to purchase, and after said purchase, there was no interest equitable or legal vested either in the Northern Pacific Railroad Company or the Northern Pacific Railway Company which could be sold under the decree of the court.

6th.—The land within the place limits of the Northern Pacific Railroad Company, claimed to have been lost to its grant, which was the basis of the selection of the land in controversy was on the south side of the railroad line, while the land selected was on the north side of its line of road, such selection is void.

7th.—The decree under which this land was sold, dated May 25, 1899, particularly directed the manner in which the lands should be sold, to-wit (Record page 150):

> "All of the said lands for which letters patent have been issued to said defendant Northern Pacific Railroad Company, and the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said company, shall be sold in single sections, or subdivisions thereof."

The land in controversy was not in either of these classe. It was neither patented to the Northern Pacific Railroad Company, nor selected by that company, and approved by the secretary, for the records show (Record p. 138), that the approval of the selection of this land was not until October 12, 1905. There was no authority given by this decree, to the special master to sell this land in the manner he did, and therefore no title to the same passed to the Northern Pacific Railway Company by reason of such sale.

8th.—The land in controversy was not included in the bill filed October 18, 1893, to foreclose the mortgage given by the Northern Pacific Railroad Company to the Farmers' Loan & Trust Company, nor in any of the subsequent mortgages given by that company. The bill filed August 15, 1896, was dismissed November 15th, 1893, so far as it had any effect in the State of Minnesota, and which is the basis of these proceedings, gave the court no authority to make a decree for the sale of these lands for the court was without any jurisdiction.

9th.—That the selection of this land as indemnity for the loss of the land within the place limits of the grant to the Northern Pacific Railroad was void, for the reason that the lieu lands was not the nearest unappropriated land to the land lost. This fact should have been shown by the Northern Pacific Railroad Company.

10th.—The act of July 2, 1864, incorporating the Northern Pacific Railroad Company, did not intend to confer this grant on any other corporation hereafter to be organized, there is no evidence in the case that the Northern Pacific Railway Company is the successor to the Northern Pacific Railroad Company, or of any other company. The land department was without any authority to convey this land to the Northern Pacific Railway Company, neither had the Northern Pacific Railway Company, under its charter, any authority to receive such conveyance.

11th.—The act of July 2, 1864, conferred no authority upon the Northern Pacific Railroad Company to execute a mortgage upon the lands granted, but on the contrary expressly prohibited the making of a mortgage. The joint resolution of May 31,1870, gave consent that a mortgage might be given but that was a charter power and when

once exercised it was exhausted, the subsequent mortgages given after the mortgage dated July 1, 1870, are all without authority and are illegal and void.

Dated January 3, 1910.

H. H. HOYT,
Counsel and Solicitor for Appellee.

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Supreme Court of the United States

OCTOBER TERM, 1909.

No. 24.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Appellants,

vs.

HERBERT H. HOYT, Appellee.

Brief of M. H. Stanford in Behalf of Herbert H. Hoyt, Appellee.

M. H. STANFORD,
Of Counsel for Appellee.

1910
MERRITT & HECTOR, PRINTERS,
DULUTH.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 195.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Appellants,

vs.

HERBERT H. HOYT, Appellee.

BRIEF OF M. H. STANFORD IN BEHALF OF HERBERT H. HOYT, APPELLEE.

This action involves the title to 40 acres of land, known and described as follows:

The Southwest quarter of the Southeast quarter (SW¼ of SE¼) of Section seven (7), Township fifty-four (54) North of Range fourteen (14) West, in the Duluth Land District of the State of Minnesota.

This controversy, like that of No. 176, Campbell vs. Humbird and Weyerhaeuser, had its origin in the conflicting orders or rulings in the land department of the United States as to what was the eastern terminus of the Northern Pacific Railroad.

On December 17, 1897, Richard B. Jones, being in all respects duly qualified, tendered his application to purchase the land above described under the provisions of the

Act of Congress dated June 3, 1878, and known as the timber and stone Act. Accompanying his application was the usual affidavit required in such case. Jones' application was accepted and received by the officers in charge of the local United States Land Office at Duluth, and such proceedings were afterwards had on said application that the necessary proofs were taken and completed March 22, 1898, and on December 10, 1898, Jones made payment for the land and received the usual evidence of title to the same from the receiver, (Pg. 139 Record, for receiver's receipt.)

The foregoing allegations of the bill are admitted in the answer.

On December 19, 1898, Richard B. Jones and wife sold and conveyed the land in controversy by warranty deed for a valuable consideration to Minnie Stewart (Exhibit P., Pg. 139 Record).

On the 22nd of March, 1902, the said Minnie Stewart, with her husband, sold and conveyed the land in controversy for a valuable consideration to the complainant Hoyt, (Exhibit R, Pg. 141 Record).

The claim of the Railway Company to the land in controversy is the same as in Campbell vs. Weyerhaeuser and Humbird, and is based on the selection of October 1, 1883, and the re-arranged list of April 11, 1893.

The selection was not approved by the Secretary of the Interior until October 17, 1905, (P. 135-138, Record), and the patent was issued the next day, October 18, 1905, (P. 75, Record, answer).

The land lost claimed as the basis for the selection was the Northwest quarter of the Northeast quarter (NW¼ of NE¼) of Section Eleven (11), Township forty-six (46), Range sixteen (16) West, Minnesota, and was situated on the South side of the Railway Company's line of railroad in the western part of the state, while the land in controversy is situated on the North side of the Company's line of railroad east of Duluth.

The deed from the Railway Company to the appellees, Weyerhaeuser and Humbird of the land in controversy bears date, January 19, 1900, (P. 201, Record), nearly five years before the Railway Company's selections were approved.

The same conflicting orders and rulings of the land department of the United States, out of which the controversy in the Campbell case arose exist and apply to the case at bar.

The United States Circuit Court of Appeals held the entire beneficial interest and the equitable right to the land vested in Jones upon his completion of his purchase, and the railroad company and its successors in interest held the title under the patent in trust for him and his grantees.

It will be noted that the only difference between the case at bar and No. 176, is that Campbell was not permitted to make his proofs, and that his application was rejected, while in the case at bar Jones' application was accepted, his proofs received, he paid for the land, and was given the usual receiver's receipt therefor long prior to the approval by the Secretary of the Interior of the Railroad Company's selection.

My brief filed in the Campbell case, No. 176, will therefore apply to the case at bar.

Mr. H. H. Hoyt has filed a full and comprehensive brief covering all of the questions involved in this case, and I will not tax the court in the consideration of another brief in this case.

Dated, March 22, 1910.

M. H. STANFORD,
Of Counsel for Appellee.

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No. ~~176~~ 12

Supplemental Brief for Appellant in No. 176, Appellee in No. 195.

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vs.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Appellee.

No. 176.

SUPPLEMENTAL BRIEF.

Mr. Bunn has discussed the foregoing cases in one brief, and his entire argument is based on the following proposition, quoting from page 17 of his brief:

> "Such a selection filed and recorded, as it was, against this land in the land office, the land department has uniformly regarded as an entry and as having the same effect to segregate the land from the general bulk of public lands that any other entry has."

The foregoing construction claimed by Mr. Bunn for the land department cannot beregarded in any other light than a disregard of the law as settled by the repeated decisions of this Court.

An entry is for a specific tract of land.

Said Justice Swayne, speaking for the Court in the case of Ryan vs. Central Pacific R. R. Co., 99 U. S. 9 Otto 382; (25 Law. 305):

> "With respect to the "lieu lands" as they are called, the right gained by selection was only a float, and attached to no specific tracts."

Said Justice Miller, speaking for the Court in the case of St. Paul and Sioux City Railroad Company vs. Winona, 112 U. S. 720; (28 Law. 872):

> "Until a valid selection by the grantee is made from the lands within the indemnity limits they are entirely open to disposition by the United States or to appropriation under the laws of the United States for the disposal of public lands."

Said Justice Field, speaking for the Court in the case of Wisconsin Central Railroad Co. vs. Price County, 133 U. S. 495; (33 Law. 687):

> "Until selections were approved there were no selections in fact."

Said Justice Brown, speaking for the Court in the case of New Orleans Pacific R. Co. vs. Parker, 143 U. S. 42; (36 Law. 66):

> "As to the lands within the indemnity limits it has always been held that no right is acquired until specific parcels have been selected by the grantee and approved by the Secretary of the Interior."

The same is held in,

> Humbird vs. Avery, 195 U. S. 480; (49 Law. 286).

This doctrine is affirmed in the late case of,

> Sjoli vs. Dreschel, 199 U. S. 564; (50 Law. 311).

The only difference between the last case cited and those at bar is that the plaintiff Sjoli made a homestead entry, while Campbell and Hoyt were applicants for purchase under the Timber and Stone Act.

I think on general principles of law, the Railroad Company acquired no right as against Campbell and Hoyt

to the land in controversy. That when their respective applications for purchase were made the land was subject to entry and purchase under the Timber and Stone Act.

This Court has universally held that *when lands have once been sold by the United States and purchase money paid the lands so sold is segregated from the public domain, and are no longer subject to entry. A subsequent sale and grant of the same lands to another person will be absolutely null and void.*

Simonds vs. Wagner, 11 Otto 260; (25 Law. 91);

Works vs. Brauson, 11 Otto 260;

Frisbie vs. Whitney, 9 Wall. 76 U. S. 987; (19 L. 666);

Lytle vs. Arkansas, 9 How. 314.

Where the right to a patent has once become vested in a purchaser of public lands it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete, are the mere ministerial acts of the officers charged with the duty.

Stark vs. Starr, 6 Wall. 73 U. S. 402; (18 Law. 925);

Simonds vs. Wagner, 11 Otto 260; (25 Law. 911);

Lindsey vs. Hawes, 67 U. S., 2 Black 554; (17 Law. 265);

Cornelius vs. Kessel, 128 U. S. 456; (32 Law. 482).

These cases also hold that the officers of the land department have no authority to cancel and entry unless fraudulent or unauthorized.

Nothing remained to be done in the Hoyt case except the mere ministerial act of issuing the patent. He was a purchaser entitled to a patent. The land department, without authority of law, cancelled his claim and patented the land to the appellant.

In the Hoyt case there seems to be no reason why the decision of the Court of Appeals that the defendants Weyerhaeuser and Humbird held the title to the land in controversy as trustees for the benefit of the complainant Hoyt should not be affirmed.

In the Campbell case it is established and not disputed that Campbell done all that the law required him to do and that he failed to attain his right because of the unlawful action of the officers of the land department. It differs from the Hoyt case only in degree. The officers of the land department permitted the applicant to proceed further towards the prosecution of his right in one case than it did in the other. The Campbell case should be reversed and the relief prayed for granted.

CASES CITED BY THE UNITED STATES CIRCUIT COURT OF APPEALS.

The case cited by the Court of Appeals in the Campbell case do not support the position of that court.

In Smelting Company vs. Kemp there cited the court says, after affirming the general rule as to the conclusiveness of a patent:

> "Of course, when we speak of the conclusive presumption attending a patent for lands we assume that it was issued in a case where the department had jurisdiction to act and execute it."

And again, in the same case at page 879:

> "A patent may be collaterially impeached in any action and its operation as a conveyance defeated by showing that the department had no jurisdiction to dispose of the land; that is, that the law did not provide for selling them or that they had been reserved for sale, or dedicated for special purposes or had been previously transferred to others."

Beard vs. Federy, 3 Wall. 478; (18 Law. 88), cited by the Court of Appeals, related to a Mexican land grant, and the authority of a certain board appointed by act of congress to pass upon such grants.

CASES CITED BY MR. BUNN.

The cases cited by Mr. Bunn in support of his contention that this Court did not mean that which it clearly expressed in Sjoli vs. Dreschel, and numerous other decisions of this Court to the same effect. None of the cases cited by Mr. Bunn have any application to the cases at bar.

Gertgens vs. O'Connor, 191 U. S. 237; (48 Law. 163), O'Connor's title was not derived through the land grant, but by virtue of Section 5 of an act of congress of March 3, 1887. United States Compiled Statutes 1901, p. 1595. The land was the property of the government. Selections had been made by the Railroad Company, but not approved. Ireland had acquired the right to purchase from the company certain of these lands when the Railroad Company should acquire title thereto. The act of congress in question authorized Ireland to purchase the land covered by the contract with the Railroad Company from the government, paying to the government its price, no portion of which was to go to the Railroad Company. It was this act of March 3, 1887, which cut out the claims under the settlement laws, and not the approval by the Secretary of the Interior of the selections prior thereto made by the Railroad Company.

United States vs. Detroit Lumber Company, 200 U. S. 231, was a case where the United States sought to set aside certain patents upon the ground that they were fraudulently acquired under the homestead laws. The receiver's receipts had been issued but not the patents. The only question decided in that case was that there were no circumstances disclosed which case suspicion upon those rights in the hands of the Lumber Company. That a purchaser from the patentees for value and without notice of any fraud on the part of the entryman is a bona fide purchaser within the meaning of the Timber Act of July 3, 1870, and the doctrine of relation applied.

McCreery vs. Haskell, 119 U. S. 327; (30 Law. 408), cited by Mr. Bunn in support of the rule "First in time first in right" involved lands selected by the state in part

satisfaction of Section 16 of one of the townships of the county which was within the limits of the confirmed Mexican grant.

By the Act of Congress of March 3, 1853, making public lands of California with certain exceptions subject to the general pre-emption laws of September 4, 1841, Sections 16 and 36 of each township were granted to the state for the purpose of public schools.

The land in question was within the claimed limits of a Mexican grant, and could not be identified until after they were surveyed by the surveyor general of the United States.

The Court held as follows:

> "For selections of lands in California in lieu of the school sections covered by Mexican grants, it has not been the practice of the land department to issue patents. When the selections are approved by the Secretary of Interior a list of them with a certificate of the commissioner of the general land office is forwarded to the state authorities. The list thus certified operated to convey the title to the state as fully as by patent."

The land in this case was originally granted to the state; if the land had been surveyed it would have passed by the grant. The selection was made prior in time to that of the preemption claimant and this selection vested the equitable title in the state requiring only the certificate of the commissioner of the general land office to pass th legal title, hence the decision in that case as between the state and the settler, "First in time, first in right," an altogether different title from that claimed by the Railroad Company and selected to satisfy the deficiencies in its grant.

ACT OF JULY 1, 1898.

Mr. Bunn follows the Court of Appeals in both cases in which he holds that neither Hoyt or Campbell are entitled to the benefit of that act. Mr. Bunn further declares that Campbell is not entitled to the benefit of that

act for the reasons that he has no entry of record against the land.

We claim for this Act of July 1, 1898, that it refers distinctly to three classes of persons, purchasers, settlers and claimants, who in good faith initiated their claim prior to January 1st, 1898, under any of the land laws of the United States to any lands either in the granted or indemnity limits of the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor has claimed to have attached by selection.

The contention of Mr. Bunn amounts to this: That under any and all circumstances the land department by an unlawful and unauthorized act by its officers and without authority of law may cut off the right of any claimant to any of these lands by denying to them the right to enter or pursue their entry under the land laws of the United States.

If this construction placed on the act by Mr. Bunn is held to be correct the Act of July 1, 1898, need never have been passed. Such construction means this and nothing more: That is it within the power of the land department in any and all cases to nullify the intention of congress as expressed in the act.

In each case the claim to the land was initiated in good faith prior to January 1, 1898, and in the absence of the Railroad Company's claim could have been perfected into a full title. The lands were open for sale when their respective applications were made. The claimants did everything in their power to perfect their rights and title to the land. Each by his act and effort attained a legal right to be preferred. The claim of each was good against every one but the one claiming the prior rigth, which in these cases was the Northern Pacific Railway Company only, and the Act of July 1, 1898, extinguished the claim of the Railway Company.

Mr. Bunn does not meet the following points made by Mr. Hoyt in his respective briefs:

1. There was no authority in the grant to the Railroad Company to issue patents for land on the north side of its road in lieu of lands deficient on the south side of its road and such patents are void.

2. The Northern Pacific Railway Company is not the successor of the Northern Pacific Railroad Company, and Weyerhaeuser and Humbird have not proved title in themselves to the lands in controversy.

As to the foregoing propositions, I would respectfully refer the Court to the brief of H. H. Hoyt, filed in these cases.

Dated, March 29, 1910.

M. H. STANFORD.

FILED
JAN 17 1911
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

October Term 1910.

FREDERICK WEYERHAUSER and
JOHN A. HUMBIRD,

Appellants,

vs.

HERBERT H. HOYT,

No. 24.

CHARLES D. CAMPBELL,

Appellant,

vs.

FREDERICK WEYERHAUSER and
JOHN A. HUMBIRD,

Appellee.

No. 12.

Reprint of Briefs of M. H. Stanford Filed in October Term, 1910, and Reply Brief.

M. H. STANFORD,
Of Counsel for Herbert H. Hoyt and Charles D. Campbell.

MILLAR PRINTING CO.
1911

Supreme Court of the United States

October Term, 1908.

FREDERICK WEYERHAUSER and
JOHN A. HUMBIRD,

Appellants,

vs.

HERBERT H. HOYT,

No. 195.

CHARLES D. CAMPBELL,

Appellant,

vs.

FREDERICK WEYERHAUSER and
JOHN A. HUMBIRD,

Appellee.

No. 176.

REPLY BRIEF BY M. H. STANFORD.

The defendants in these cases, and I refer to the defendants in the ~~both~~ cases, seek to distinguish the cases at bar from the long line of decisions of this court, whereby the doctrine has been established: THAT AS TO LIEU LANDS WITHIN THE INDEMNITY LIMITS OF A RAILROAD COMPANY'S LAND GRANT, NO RIGHT IS ACQUIRED BY A RAILROAD COMPANY IN ANY PARTICULAR LANDS UNTIL THE SELECTIONS MADE BY IT ARE APPROVED BY THE SECRETRY OF THE INTERIOR.

Ignoring the foregoing doctrine, the defendants contend that the filing of the selections in the local United States Land Office against particular lands constitutes an entry and has the same effect to segregate the land from the general bulk of public lands than any other has.

The opposing counsel in support of their contention, seek to confine the doctrine established by this court, as applying only to a particular class of entries and to such cases only, wherein the entryman has initiated his claim prior to the filing by the railroad company of its lists of selections in the land office. We submit:

First: That in none of the cases decided by this court as to the time when the railroad company's right to particular lands was initiated, has the question as to the class of entries been material.

Second: In none of the cases decided by this court has the question as to the date of the filing of the railroad company's selections of indemnity lands, as between it and the claimant under any one of the general land laws of the United States been material.

And we further submit, that in every case which has been before this court, where it has been necessary to decide the question, this court has held:

THAT NO RIGHT TO PARTICULAR LANDS WITHIN THE INDEMNITY LIMITS WILL ATTACH IN FAVOR OF A RAILROAD COMPANY UNTIL THE SELECTIONS MADE BY IT HAVE BEEN APPROVED BY THE SECRETARY OF THE INTERIOR. THAT UP TO THE TIME SUCH APPROVAL IS GIVEN, LANDS WITHIN THE INDEMNITY LIMITS ARE SUBJECT TO DISPOSAL OF THE UNITED STATES OR TO BE SETTLED UPON AND DISPOSED OF UNDER THE PUBLIC LAND LAWS OF THE UNITED STATES.

We therefore contend, that the complainants in the cases at bar, having made application to the local land office for the purchase of the respective parcels of land, long before the selections made by the railroad company had been approved of

by the secretary of the interior, each applicant being in all respects qualified to make application and purchase the same by complying with the provisions of the timber and stone act, so called, and were prevented from proceeding further in the acquiring of title by the unwarranted action of the land department, that the complainants by such application were under the circumstances, the first to initiate a claim to the land and therefore being first in time were first in right.

We wish to refer briefly to the acts of congress, by virtue of which the Northern Pacific Railroad Company claims title to its lands. Sufficient for our purpose are the portions of the acts quoted and appear in the brief of Mr. Charles W. Bunn in the cases at bar at pages 3 and 5.

Quoting from page 3 of his brief, Section 3 of the Act of Congress of July 2nd, 1864, says:

> "And be it further enacted, that there be and hereby is granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding, etc."

then follows the description of the lands granted, the reserves and exceptions, etc., from the grant.

Quoting further from the same section of the act:

> "and whenever, prior to said time (the time the line of said road becomes definitely fixed and a plat thereof filed in the office of the commissioner of the general land office), any of said sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company, in lieu thereof, under the direction of the secretary of the interior, in alternate sections, etc."

Again quoting from the joint resolution of May 31st, 1870, page 5 of the brief of Mr. Bunn, we find the same language used as in the act of July 2nd, 1864, relating only to lieu or indemnity lands, it reads as follows:

> "then said company shall be entitled, under the direction of the Secretary of the Interior, to receive so many sections, etc."

As to the place land, granted lands as they are termed, there is an absolute grant: "that there be and hereby is

granted." Quite the contrary is the language of the act as to the indemnity lands, no words of grant are used; a privilege, it might be termed, is given; a right to select under the direction of the Secretary certain lands to supply its losses in the place or granted limits.

It would seem as though no more apt language could be used to express the clear intention of congress as to the right intended to be conferred on the railroad company by these acts, in relation to the two classes of land. As to the place lands, it is a present grant; and this court has established the rule, that when the line of the road has been definitely fixed and the conditions precedent have been performed, the title to the place lands vests in the railroad company by relation as of the date of the act.

As to the lieu or indemnity lands the intention of congress is equally clear as expressed in the acts under consideration. No present right is conferred in any particular lands by the act of congress, no future right is confirmed as to any particular lands, no promise of a grant as to any particular lands is made in either act of congress under consideration. Congress by said acts grants to the railroad company a privilege only, which becomes a right when the lands have been selected by it and the selections approved by the Secretary of the Interior, no right vests in the railroad company until the selection is approved and the date of the right extends no farther back than to the date of such approval. There is no room for the doctrine of relation in this case under the terms of the act so as to cut off any right initiated before the selections have been approved by the secretary, for until such approval there is no right of the company, previous to the time of such approval to which it can relate.

As regards the rights of the railroad company to any lands within the indemnity limits, as against any other claimant under the public land laws of the United States, it is not a question as to any class of entries under such laws, homestead, timber and stone or any other, the question is and must always be under the laws in question, did the opposing claimant initiate

a lawful claim to the land prior to the approval by the Secretary of the Interior of the companies selection of lieu lands?

We have cited a long line of cases in our several briefs, cases decided by this court, some of them extending back for a period of nearly forty years, construing congressional acts involving provsions for lieu or indemnity lands in aid of railroads, where the language was substantially and practically the same as that used in the Northern Pacific Railroad act and its decision by this court in every case that has come before it, where it has been necessary to decide the question has been the same; that no right to indemnity lands accrue to the railroad company until the selections made by the railroad company have been approved by the Secretary of the Interior, and from the language used by congress in these acts we cannot conceive how any other conclusion, any other construction of the congressional intent would be possible. The construction placed by this court on the language used by congress in the several acts, gives effect to the plain meaning of the words used, when they are considered in connection with all of the provisions of the act.

II.

The claim is made, that the railway company's selections, having been accepted and allowed by the local land office, segregated the land against complainants' application to enter the same so that no rights attached under that application, regardless of the validity or invalidity of the prior selection.

We would ask the gentlemen who advance this proposition to point us to a single authority which gives to the officers of the local land office power to do that, which this court has repeatedly and always held not even the Secretary of the Interior can exercise.

In Sjoli v. Dreschell, 199 U. S. 564, 50 L. 312, Justice Harlan, speaking for this court, said:

> "From the numerous cases in this court, relating to the act of July 2nd, 1864, the following propositions are to be deduced, among which propositions is the following: That the Secretary has no authority to withdraw from sale or settlement lands that are within indemnity limits, which

have not been previously selected with his approval to supply deficiency within the place limits of the company's road."

This rule has been declared by this court in a long line of decisions, among which are the Oregon & California Railway Co. v. Nelson, 189 U. S. 103; Avery v. Humbird and Weyerhauser and others cited in our briefs, also Osborn v. Forsyth, decided at the last term of this court.

The claim of our opponents, that the acceptance and filing of the company's selections by the local land officers, segregated the land against complainants' applications is based on the erroneous theory that such selections filed and recorded operated as against the land in controversy the same as an entry under the homestead and pre-emption laws.

This contention can be sustained only by ignoring the settled rule of this court, that no rights attach to lieu or indemnity lands in favor of a railroad company, until the selections made by it have been approved by the Secretary of the Interior.

III.

Our opponents invoke the doctrine of relation in support of their claim of title; they say that when the railroad company's selection was approved by the Secretary of the Interior and patents issued to the company for the land, the approval and the patent related back to the original selection and cut off all intervening claims.

Before the doctrine of relation can be applied for the benefit of the railroad title in these actions, certain fundamental principles of law declared by this court must be repudiated.

First: That the title by relation extends no further back than to the inception of the equitable right.

Husman v. Durham, 165 U. S. 144, at 148; 41 L. 664, at 665.

Second: The doctrine of relation is never allowed to defeat the collateral rights of third parties.

Johnson v. Jones, 66 U. S., 1 Black 209; 17 L. 117, at 120;

United States v. Anderson, 194 U. S. 394 (48 L. 1035 at 1039).

Third: The doctrine of relation is a fiction of law and in the construction of land grants and the public land laws the will and intent of congress must be kept in view, that and not common law gives control.

Missouri, Kan. and T. R. R. Co. vs. K. P. R. R. Co., 97 U. S. 491; 24 L. 1095 at 1097;

U. S. v. K. P. R. R. Co., 146 U. S. 570; 36 L. 1091 at 1097;

Wis. Cen. R. R. Co. v. Forsyth, 159 U. S. 46; 40 L. 71.

The railroad company could acquire no right to the land in question until the selections made by it had been approved by the Secretary of the Interior and when the selections were approved by the secretary the complainants had initiated their claims and would have perfected their title to the land except for the unauthorized action of the land department.

Not a case is cited by them which supports their claim of the doctrine of relation as applied to their claims of title.

Quoting from Musser v. M'Rae, 44 Minn. 343 at 346, cited by defendants in their brief:

> "The doctrine of relation is founded in equitbale principals and the party claiming its application must show an equity in his favor. It is a fiction of law, resorted to for the advancement of right and justice * * * although it is never allowable when it would defeat the rights of third persons."

They cite United States v. Anderson, 194 U. S. 394 (48 L. 1035), in the language of their brief, say: "is absolutely conclusive of the question now under discussion."

Quoting from the opinion of Justice White, who spoke for the court in this case (at pg. 399, S. C. R. L. 1039):

> "This results because, on this record, the rights of third parties are not involved, since the controversy concerns only the right of the United States to retain as against its grantee, the proceeds recovered by it as the

> result of a trespass upon land, after an application for the selection of such land and pending action thereon by the proper officers of the government. Under these circumstances, the case is one for the application of the fiction of relation, by which in the interest of justice, a legal title is held to relate back to the initiatory step for the acquisition of the land."

They cite United States v. Detroit Lumber Company, 200 U. S., 50 L. 499, as supporting their claim to the benefit of the doctrine of relation. In this case the court says at p. 335, L. 505:

> "A patent from the United States operates to transfer the title, not merely from the date of the patent, BUT FROM THE INCEPTION OF THE EQUITABLE RIGHT UPON WHICH IT IS BASED: Sheply v. Cowen, 91 U. S. 330, 23 L. 424."

When we recall the facts in the cases at bar and apply the doctrine of this court to such facts: the doctrine that a railroad company acquires no right to indemnity lands until its selections have been approved by the Secretary of the Interior, their claim to the benefit of the doctrine of relation seems far fetched.

Under the repeated decision of this court, the railroad had no right or claim to the lands in question as against the complainants in these actions: at the time the application was made by them to purchase the land, which under the facts in this case was the time of the inception of the complainants' equitable rights to this land.

When the selections were approved by the secretary, the equitable rights of the complainants had long before been initiated.

The record shows that the complainants did all in their power to perfect their claim and title to the land: that except for the claim asserted by the railroad company, the lands were subject to entry under the public land laws of the United States: that except for the unauthorized action of the land department they would have perfected their respective titles.

Our opponents cite a large number of cases in support of the doctrine: "THE FIRST IN TIME IN THE COM-

MENCEMENT OF PROCEEDING FOR THE ACQUISITION OF TITLE, WHEN THE SAME ARE REGULARLY FOLLOWED UP, IS DEEMED TO BE FIRST IN RIGHT."

This doctrine to us is controling in these cases, and we invoke this doctrine in support of the claims of the complainants in these actions.

From an examination of the authorities, it is clear, that the doctrine of first in time first in right is only applied in relation to the acquisition of the public lands of the United States where the respective parties occupy the same position under the law, that is each party has an equal right to acquire title to the land, by complying with the conditions precedent prescribed by the act under which he claims. In which case he who first initiates a lawful claim is first in right.

In the case of Sheply v. Cowen, cited and quoted from in the Kellog and Burr brief at page 83, said Justice Field, speaking for the court:

> "But there is another view of the case, which is equally fatal to the claim of the plaintiffs, if the land outside of the survey as retraced by Brown in 1834 could be deemed public land, open to selection by the State of Missouri from the time the survey was returned to the land office, it was equally open from that date to settlement, and consequently pre-emption by settlers, the same limitation which was imposed by law upon settlement was imposed by law upon the selection of the state. The party who takes the initiatory step in such case, if followed up by a patent, is deemed to have acquired the better right."

The case of McCreery v. Haskell, 119 U. S. 327, 30 L. 408, from which Messrs. Kellog and Burr quote, appearing on same and following page of their brief. Plaintiff claimed title by patent dated Oct. 10, 1879, from the United States issued under an alleged settlement and purchase under the pre-emption law. The defendant traced title by patent from the State of California, bearing date March 4th, 1874. The land was selected by the state in part satisfaction of section 16 of one of the townships of the county, which was within the limits of a confirmed Mexican grant.

By the act of congress of March, 1853, making public lands of California, with certain exceptions, subject to the general

pre-emption law of Sept. 4th, 1841, sections 16 and 36 of each township were granted to the state, provided the sections, before the public surveys were extended over them were not settled upon, etc. If the sections were thus settled upon, or reserved or taken by private claims, the state was authorized to select other lands in lieu thereof. The act of congress of July 23, 1866, provided that where a claim to land by virtue of a right or title derived from Spanish or Mexican authorities had been finally or thereafter confirmed and a plat thereafter within ten months after the passage of the act had not been requested after the final confirmation subsequently made, it should be the duty of the Surveyor General of the United States for California, as soon as practical, to run lines of the public survey to be extended over said lands, and to set off in full satisfaction of such grant and according to the lines of the public survey the quantity of land confirmed by such final decree and as nearly as could be in accordance therewith. "All the lands not included in such grant so set off shall be subject to the general land laws of the United States." Under this act the lands were surveyed by deputy United States surveyor and set apart to the grantees in satisfaction of the grant. The survey was approved and on the 22nd of April, 1868, the plats were filed in the district land office.

The land lying outside of this survey thus became, in the language of the act, "SUBJECT TO THE GENERAL LAND LAWS OF THE UNITED STATES." Quoting from the opinion of Justice Fields, from pg. S. C. R. and pg. 409 L.:

> "It was open to settlement with other public lands, and consequent pre-emption; and to selection by the state in lieu of the school sections within the confirmed Mexican grant. Fraiser v. O'Connor, 115 U. S. 102, 113, 29 L. 311, 3115, as between the settler and the state, the party which first commenced the proceeding, required to obtain the title if followed up, etc., is considered as being entitled to the property. In such case the rule prevails that the first in time is first in right."

In this case it appears that the state and the settler each had an equal claim on the land under the respective acts of congress. There was the promise of a grant to the state which could be initiated by the selection, which selection, however,

was required to be approved by the Secretary of the Interior. The settler on the other hand had a right to settle on the land under the pre-emption law, if the state had not already initiated its claim. The initiation of the state's claim in that case was the selection by the state. It was not a selection under the direction of the Secretary of the Interior or selection with his approval.

Both parties claimed under acts of congress and each initiated his claim as required by the act of congress. In the case at bar no right was initiated in favor of the railroad company until the selections were made under the direction of the Secretary of the Interior, that is until the selections were approved by the Secretary of the Interior, and long before this approval the complainants had initiated their respective rights in the manner shown and if the railroad company and the complainants had an equal right to the land before a right was initiated and the complainants having made application, though ineffectual, under the circumstances the complainants were first in time and therefore first in right.

There are certain exceptions to the rule invoked by opposing counsel, that: "When in fact the patent does issue, it relates back to the inception of the right of the patentee, so far as may be necessary to cut off intervening claimants, an exception is distinctly made in the cases cited by opposing council."

St. Louis Smelting Co. v. Kemp, 104 U. S. 36, 26 L. 875 cited. This was an action of ejectment, yet in this action the court declared the well settled principal: "IF THE PATENT BE ISSUED WITHOUT AUTHORITY IT MAY BE IMPEACHED IN A COURT OF LAW."

It is our contention in the cases at bar, that the patent was issued without authority, as against the complainants' rights in the land. That the land department not only had no authority to issue the patent but the Secretary of the Interior had no authority to approve of the selections of the lands involved in the cases at bar, that issuing the patents as well as the approval of selections was a mistake of law.

The cases at bar being actions in equity the rule is universal, as established by this court:

> "That after a disputed claim for any tract of public land has been heard, considered and determined, and patent therefor issued, the courts of equity have jurisdiction and will afford relief to either of the contesting parties, who may have suffered wrong, or who have been unjustly deprived of any substantial right or denied any substantial privilege."

Marquez v. Fresbre, 101 U. S. 136;

Minnesota v. Batchelder, 1 Wall. 109;

Johnson v. Towsley, 13 Wall. 72;

Hewett v. Schultz, 180 U. S. 136;

Duluth & Iron Range R. R. v. Roy, 173 U. S. 587, 43 L. 820.

The cases cited by the U. S. C. C. of Appeals in the Campbell case in support of its decision that Campbell had not placed himself in privity with the United States in title before patent issued to the railway company and therefore could not maintain a bill in equity to charge the title under the patent with a trust in his favor, have no application to the case at bar. The rule there invoked applies only where the United States itself has disposed of the land. The distinction between the two classes of cases is clearly pointed out in Hutchings v. Low (the Yosemite Valley case), 15 Wall. 77, 21 L. 82.

Said Justice Field, who spoke for this court:

> "In the case from Arkansas (referring to Lytle v. Arkansas, 9 How. 333), the right of Cloyes had been defeated by the failure of the executive officers to perform their duty under the law, he having complied fully with its provisions, except so far as he was prevented by such failure and thus having acquired a right to the title from the government. In the present case no default on the part of an executive officer is alleged or pretended. The ground of complaint is that the defendant could not acquire the title under the pre-emption laws, because congress had granted the land to the state and thus withdrawn it from sale. In the one case it is the action of an executive officer which is the ground of complaint; in the other it is the action of congress."

In the cases at bar it is the action of the executive officers which is the ground of complaint by the complainants, as it

was in the case of the D. & I. R. Co. vs. Roy, Lyttle vs. Arkansas, and others cited.

It will be remembered that the complainant Hoyt bases his claim to the land on the application of Jones, which was made at the local land office on the 17th of December, 1897. That Campbell made three applications, the first that of 1895, that this application was renewed Nov. 9th, 1896, and again renewed Dec. 7th, 1897; that all of the applications for the land in the Campbell case were rejected for the sole reason that they conflicted with the prior selections of the Northern Pacific Railroad Company filed in the land office in 1883.

When the respective applications of 1896 and 1897 were made the railroad company's selections had been cancelled by order of the Secretary of the Interior and the lands in controversy were by the same authority restored to the public domain and subject to disposal in the same manner as other public lands. Campbell through his original application of 1895 as well as by the two renewals thereof of 1896 and 1897 obtained a preference right to purchase over all others. Under the repeated decisions of this court, no interest was in the way of the attachment of this right to the land when the application of 1895 was made.

The late case of Osborn v. Forsyth, decided in March last, previously cited, affirmed the doctrine that the Secretary had no authority to withdraw from settlement and sale, lands within the indemnity limits of the grant, which selections had not before been approved by him.

Such being the rule, it is self evident that the attempted restoration by the land department of the company's selection to the records of the land office and the assumed segregation of the lands in question for the benefit of the company under its order of 1900, long after the complainants' respective applications were made was likewise ineffectual to affect the complainants' rights.

Certainly, should we see fit to adopt the line of defendants' argument and apply it to the situation of the lands in question, as shown by the records of the land department, at the time

the respective applications of 1896 and 1897 were made, such applications would cut off the alleged rights which the defendants claimed to have secured by the original filing of selections in 1883.

As to the lands involved in the Hoyt case, all of the reasons apply in support of his right that exist in the Campbell case.

December 17th, 1897, when Jones, under whom Hoyt derived his title to the land, made his aplication to the local land office, such land was subject to purchase under the timber and stone act, so called, as shown by the records in the land office; the alleged claim of the railroad company having been previously cancelled by the action of the department.

The local officers received his application and accepted their fees for its filing. On the same day notice of this filing and that the applicant would present his proofs thereunder on March 22, 1898, was issued by the register of the local land office and on the next day it was posted and published; on December 22, 1898, Jones made plenary proof and on December 10th, 1898, he bought and paid for the land in question in strict compliance with the provisions of the timber and stone act and the receiver of the local office issued the customary receipt to him, save that he wrote across it in red ink, "This receipt is issued under the order of the Secretary of the Interior, dated February 28, 1898, subject to any claim the Northern Pacific Railroad Company have to the lands herein described."

On July 12th, 1900, the Secretary restored to the records of the land department, the selections made by the company of this and other lands coterminous with the portion of the line of the railroad east of Duluth. The Secretary never approved the selections of the company of this land or of any land coterminous with the line of its railroad east of Duluth until 1905, when the Secretary sustained a decision of the Commissioner of the General Land Office that the entry of Jones should be cancelled and he subsequently caused a patent for the land to be issued to the railroad company.

Judge Sanborn, speaking for the Court of Appeals in this case, held: That Jones was a qualified entryman. The attempted withdrawals and selections of the land by the Secretary prior to his approval of the company's selections were unauthorized by law and without legal effect. The land was open to entry and purchase until he approves the selections. Jones entered, bought and paid for it before any such approval was made. That Jones, by his entry and purchase, acquired the entire beneficial ownership and the equitable right to the land in controversy and that the railroad company and its successors in interest obtained nothing under the patent but the naked legal title which they held in trust for Jones and for his successors in interest.

The opinion of Judge Sanborn is exhaustive and meets every objection advanced by the defendants in this case.

In the Campbell case, on the question of jurisdiction, the Court of Appeals dismissing the bill for want of equities in the bill. That court evidently overlooked the distinction which this court has always recognized between the failure of an executive officer to perform his duty by reason of which a party is deprived of a right and a case in which the ground of complaint is the action of congress as we have hereinbefore called to the court's attention.

The Court of Appeals held in the Campbell case that he was not entitled to the land under the provisions of Sundry Civil Act of July 1, 1898, as the beneficiaries under that act are purchasers directly from the United States, occupants of, and qualified settlers upon the land there described prior to January 1, 1898, claiming under some law of the United States or some ruling of the interior department, that Campbell was not a member of either of these classes. He had not purchased, or occupied, or settled upon, or acquired an equitable right to or an interest in the land in controversy prior to July 1, 1898.

We submit that the Court of Appeals, by this holding, committed the same error as in its holding that Campbell was not in such privity with the United States in title, before

patent issued to another as to entitle him to maintain a bill in equity to charge the title under the patent with a trust in his favor. Had Campbell been permitted by the officers of the land department to proceed with his proofs and with the necessary steps to the acquirement of title, by following the ordinary course of procedure in the department he would have been able to complete his purchase long before January 1, 1898.

The purpose of the act as declared by this court in Humbird and Weyerhauser v. Avery is sufficiently comprehensive to cover the rights of the complainants in the case at bar; Campbell as well as Hoyt each initiated his claim long before January 1, 1898, each was prevented by acquiring the legal title to the land involved by the mistake or unlawful action of the officers of the land department.

Defendants claim to be purchasers in good faith from the patentees of the government. It will be remembered that the defendants made their purchase from the railway company January 19th, 1900. The legal title at that time was in the United States, and remained in the United States until the land was patented in 1905, they therefore could not be purchasers in good faith in the sense of being bona fide purchasers so as to be entitled to the protection of chancery, a party must show that by his purchase and by the conveyance he acquired a legal title.

Hawley v. Diller, 178 U. S. 476 at 485, 44 L. 1157 at 1161.

The following is a reprint of my briefs in the above cases filed herein during the October, 1910, term of this court.

M. H. STANFORD,

Of Counsel for Herbert H. Hoyt and Charles D. Campbell.

SUPREME COURT OF THE UNITED STATES.

October Term, 1909.

No. 195.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD,

Appellants,

vs.

HERBERT H. HOYT,

Appellee.

BRIEF OF M. H. STANFORD IN BEHALF OF HERBERT H. HOYT, APPELLEE.

This action involves the title to 40 acres of land known and described as follows:

The Southwest quarter of the Southeast quarter (SW¼ of SE¼) of Section seven (7), Township fifty-four (54) North of Range fourteen (14) West, in the Duluth Land District of the State of Minnesota.

This controversy, like that of No. 176, Campbell vs. Humbird and Weyerhaeuser, had its origin in the conflicting orders or ruling in the land department of the United States as to what was the eastern terminus of the Northern Pacific Railroad.

On December 17, 1897, Richard B. Jones, being in all respects duly qualified, tendered his application to purchase the land above described under the provisions of the Act of Congress dated June 3, 1878, and known as the timber and stone act. Accompanying his application was the usual affidavit required in such case. Jones' application was accepted and received by the officers in charge of the local United States Land Office at Duluth, and such proceedings were afterwards had on said application that the necessary proofs were taken and completed March 22, 1898, and on December 10, 1898,

Jones made payment for the land and received the usual evidence of title to the same from the receiver (Pg. 139 Record for receiver's receipt).

The foregoing allegations of the bill are admitted in the answer.

On December 19, 1898, Richard B. Jones and wife sold and conveyed the land in controversy by warranty deed for a valuable consideration to Minnie Stewart (Exhibit P, Pg. 139 Record).

On the 22nd of March, 1902, the said Minnie Stewart, with her husband, sold and conveyed the land in controversy for a valuable consideration to the complainant Hoyt (Exhibit R, Pg. 141 Record).

The claim of the Railway Company to the land in controversy is the same as in Campbell vs. Weyerhaeuser and Humbird, and is based on the selection of October 1, 1883, and the re-arranged list of April 11, 1893.

The selection was not approved by the Secretary of the Interior until October 17, 1905 (P. 135-138, Record), and the patent was issued the next day, October 18, 1905 (P. 75, Record, answer).

The land lost claimed as the basis for the selection was the Northwest quarter of the Northeast quarter ($NW\frac{1}{4}$ of $NE\frac{1}{4}$) of Section Eleven (11), Township forty-six (46), Range sixteen (16) West, Minnesota, and was situated on the South side of the Railway Company's line of railroad in the western part of the state, while the land in controversy is situated on the North side of the Company's line of railroad east of Duluth.

The deed from the Railway Company to the appellees, Weyerhaeuser and Humbird, of the land in controversy bears date January 19, 1900 (P. 201, Record), nearly five years before the Railway Company's selections were approved.

The same conflicting orders and ruling of the land department of the United States, out of which the controversy in the Campbell case arose exist and apply to the case at bar.

The United States Circuit Court of Appeals held the entire

beneficial interest and the equitable right to the land vested in Jones upon his completion of his purchase, and the railroad company and its successors in interest held the title under the patent in trust for him and his grantees.

It will be noted that the only difference between the case at bar and No. 176, is that Campbell was not permitted to make his proofs, and that his application was rejected, while in the case at bar Jones' application was accepted, his proofs received, he paid for the land, and was given the usual receiver's receipt therefor long prior to the approval by the Secretary of the Interior of the Railroad Company's selection.

My brief filed in the Campbell case, No. 176, will therefore apply to the case at bar.

Mr. H. H. Hoyt has filed a full and comprehensive brief covering all of the questions involved in this case, and I will not tax the court in the consideration of another brief in this case.

Dated, March 22, 1910.

M. H. STANFORD,
Of Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1909.

No. 176.

CHARLES D. CAMPBELL,

Appellant,

vs.

JOHN A. HUMBIRD and FREDERICK WEYERHAUSER,

Respondents.

BRIEF OF M. H. STANFORD IN BEHALF OF APPELLANT.

This action involves the title to 160 acres of land situated in St. Louis County, Minnesota. The controversy had its origin in conflicting orders or rulings in the land department of the United States as to what was the eastern terminus of the Northern Pacific Railroad Company.

A statement of the case appears in the Brief of H. H. Hoyt commencing at page 53.

The appellant, Campbell, claims the right over all others to purchase the land in controversy under Act of Congress of June 3, 1878, known as the Timber and Stone Act.

The appellees, Humbird & Weyerhaeuser, claim title under and by virtue of a conveyance from the Northern Pacific Railway Company, which company claims to be the successor to the Northern Pacific Railroad Company and the basis of appellees' title is the land grant to the Northern Pacific Railroad Company by Act of Congress of July 3, 1864, and the joint resolution of congress of May 31, 1870, and the preliminary selection of the land by list filed in the land office October 17, 1883, which selection was for the purpose of indemnifying the Railroad Company for losses in its place limits. This selection list specified losses in bulk.

April 11, 1893, the Railroad Company, acting under the direction of the Secretary of the Interior, re-arranged the selection list so as to specify a particular tract lost as the basis for each selection, and in the re-arranged list there was set opposite the tract in controversy, the Southeast quarter (SE¼) of Section nineteen (19), Township one hundred and thirty-three (133), North of Range thirty-four (34) West, West of Duluth. The land claimed to be lost is situated on the South side of the line of the Northern Pacific Railroad Company in the western portion of the state, while the land involved in this action is situated on the North side of the line of the Northern Pacific Railroad Company, East of Duluth, and is known and described as the Southeast quarter of Section twenty-one, Township fifty-four, North Range Twelve, West of the Fourth Principal Meridian, within the Duluth land district of Minnesota.

The Railroad Company took no steps to claim or identify this land as a part of its indemnity until October 17, 1883, as before mentioned, when it filed its first list under said joint resolution, dated May 31, 1870, and thereafter the revised lits filed on the 11th day of April, 1893. This selection was not approved by the Secretary of the Interior until November 7, 1905, and the land was patented to the Northern Pacific Railroad Company November 13, 1905.

ARGUMENT.

It will be noted that on November 9, 1896, and December 7, 1897, the date of the two last applications of the plaintiff, the land in controversy had been restored to, and was a part of the public domain.

Campbell was prevented from acquiring title to the land by reason of the prior claim to the same by the Northern Pacific Railway Company, under its selections, and except for this claim based on said selection Campbell might have proceeded to perfect his title to the land.

The United States never has asserted any claim to the land, other than it belongs to the public domain.

Campbell claims that his rights are protected by Act of July 1, 1898, portions of which act appear in Brief of Mr Hoyt, at pages 70 and 72, and in the Brief of Mr. Bunn, commencing at page 40 and extending to page 43, but if the land is not covered by that act, Campbell claims to have a preferential right of purchase, which right was ignored by the land department, and which he believes the court will protect.

The United States Circuit Court of Appeals in affirming the decree of the lower court in this case, held that the beneficiaries of the Act of July 1, 1898, are purchasers directly from the United States or occupants of and qualified settlers upon the lands therein described prior to January 1st, 1898, under some law of the United States or some ruling of the interior department and that Campbell did not come within the act.

The appellees contend in their Brief that the purpose of the Act of July 1, 1898, was to furnish a means of adjustment of the controversy between the Northern Pacific and the settlers within its grant.

The construction placed on the Act of July 1, 1898, by the Court of Appeals and that for which the defendant in error contends, appears not only unreasonable but also unjust to a large number of claimants who without the aid of the act might have perfected their title and excluded from its benefits a large portion of the claims which congress undoubtedly had in mind at the time of its adoption.

The cardinal rule of construction is to ascertain and effectuate the legislative intent, and for this purpose where the language of the statute is in any manner ambiguous or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times and the defect or mischief which the statute was intended to remedy.

United States vs. Northern Pac. R. Co., 91 U. S. 72-79 (23 Law. 224-228);

Humbird vs. Avery, 195 U. S. 480 (49 Law. 295);

Platt vs. Pac. Ry. Co., 99 U. S. 48-64 (25 Law. 425-429);

Smith vs. Townsend, 148 U. S. 498 (37 Law. 535);

Lake Superior Ship Canal Ry. & I. Co. vs. Cunningham, 155 U. S. 354 (39 Law. 183);
Funk vs. St. Paul City Ry. Co., 61 Minn. 439.

In this connection I call attention to certain conditions relating to the indemnity lands of the Northern Pacific Railway which existed at the time of the passage of the Act of July 1, 1898. The bill was introduced after the denial by the department of an application of the Northern Pacific Railroad Company (December 13, 1897; 25 L. D. 501), for the suspension from entry and patent the remaining undisposed lands in the odd numbered sections within that part of the formerly recognized limits of the grant to said company lying east of the terminus established by the department, decision of August 26, 1896.

The order of February 28, 1898 (26 L. D. 265) was passed on the petition of the Northern Pacific Railway Company dated January 20, 1898, for a re-consideration of the decision of December 13, 1897, above referred to.

It also appears that the United States, September 3, 1897 (26 L. D. 265), had commenced action against the Northern Pacific Railroad Company in the Circuit Court of the United States for the District of Minnesota, to secure a judicial determination by the courts as to the eastern terminus of said road.

The Dougherty case in the lower courts of Wisconsin had passed against the claim of said railroad campany. A large number of suits had been instituted by the Northern Pacific Railroad Company in Minnesota, North Dakota, Montana and Washington.

The land department was confident as to the correctness of its decision, that the eastern terminus of the Northern Pacific Railroad Company was at Duluth and it resisted all efforts of the company in its desire for suspension of entry of these lands. Prior to this the lands had been restored to the public domain; the lands were applied for by persons duly qualified; some of the lands passed to patent, other were purchased prior to January 1, 1898, while a large quantity of the

lands unfit for cultivation but valuable for timber were applied for under the timber and stone law, and by reason of contests and other conflicting claims the applications were not acted upon prior to the order of suspension of February 28, 1898.

Under these conditions this law was enacted, having for its purpose and object the quieting of disputes respecting the title to lands within the Northern Pacific Land Grant and protecting settlers and other claimants under the public land laws from the claims and suits of the company, as well as to protect the company itself against loss from its grant.

Said Justice Harlan, in Humbird vs. Avery, cited:

> "Obviously, the first inquiry should be as to the object and scope of the act of 1898. Upon that point we do not think any doubt can be entertained, if the words of the act be interpreted in the light of the situation as it actually was at the date of its passage. Here were vast bodies of land, the right and title to which was in dispute between a railroad company holding a grant of public lands, and occupants and purchasers—both sides claiming under the United States. The disputes had arisen out of conflicting orders or rulings of the land department and it became the duty of the government to remove the difficulties which had come upon the parties in consequence of such orders. The settlement of those disputes was therefore, as the circuit court said, a matter of public concern. If the disputes were not accommodated, the litigation in relation to the lands would become vexatious, extending over many years and causing great embarrassment.
>
> In the light of that situation congress passed the act of 1898, which opened up a way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned—the government, the railroad grantee, and individual claimants. The railroad company evinced its approval of this action of the legislative department by a prompt acceptance of the act in its entirety. By such unqualified acceptance the railroad company agreed that, so far as it had any claim to the lands in dispute, whatever the act of congress required to be done, might be done."

Said Justice Lochran, in the same case, in his opinion filed in the Circuit Court, 110 Federal Reporter 465:

> "The obvious purpose of this act was to provide a certain speedy and equitable way in which all contro-

ersies between the railroad grantee or its successors, and purchasers or settlers upon odd numbered sections within the place or indemnity limits of the land grant who claimed by color of any law of the United States or any ruling of the land department should be settled and adjusted without contest or litigation, either in the land department or in the courts. The railroad company, by its express acceptance of the act, became bound by its provisions, and obliged to carry out its terms."

Under the circumstances then existing, is there reason for the narrow construction placed on this act by the United States Circuit Court of Appeals in this case? On the contrary would it not be a natural and reasonable construction to give effect to the words of the act "*And provided further that all qualified settlers, their heirs or assigns, who prior to January* 1, 1898, *purchased or settled upon or claimed in good faith under color of title or claim of right under any law of the United States or any ruling of the interior department any part of an odd numbered section*, neither the granted or indemnity limits of the land granted to the Northern Pacific Railroad Company to which the right of such grantee or its lawful successor is claimed to have attached."

I quote from Sutherland on Statutory Construction, Section 346:

> "Statutes are seldom written in such precise and categorical terms as to point out inclusively and exclusively all their intended applications. General and more or less flexible language is used. It is construed with reference to the subject of the act, its purpose; and popular words are read and understood according to their common acceptation."

Section 347:

> "Strict construction is not a precise but a relative expression. It varies in degree of strictness according to the character of the law under construction."

Section 348:

> "The rule of strict construction is not violated by permitting the words of a statute to have their full meaning. The letter of remedial statutes may be extended to include cases clearly within the mischief they were intended to remedy, unless such construction does violence to the language used."

Judge Sutherland seems to have expressed in the foregoing quoted matter the spirit which has controlled this court in the consideration and construction of statutes in the various cases with which I am familiar.

The situation of the Northern Pacific Railroad Company and the various adverse claimants to the land at the time of the passage of the Act of July 1, 1898, was similar to that of the parties in Lake Superior Ship Canal Railway & Iron Company vs. Cunningham, heretofore cited. In that case under Act of Congress of March 2, 1889, there was declared forfeited to United States certain of the lands granted to the State of Michigan by Act of Congress in 1856 in aid of a railroad, and by the same act, that is March 2, 1889, the title to the Canal Company as to certain lands selected and certified with the approval of the Secretary of the Interior in satisfaction of a subsequent canal grant was confirmed, except lands on which there was bona fide pre-emption or homestead claims on May 1, 1888, about ten months previous to the passage of the act, which were also confirmed.

> Lake Superior Ship Canal Railway & Iron Co. vs. Cunningham, 155 U. S. 354 (39 L. 189).

At the time of the passage of the Act of March 2, 1889, the Court held that neither the plaintiff nor the defendant had any right or title to the tract in controversy; that it was only by virtue of the act of congress in question that their respective titles were acquired.

Said this Court, construing the Act of March 2, 1889:

> "The second and third sections are the troublesome parts of the act and it must be conceded that the true construction is not altogether obvious, and yet, when the situation as it existed and as it was then known to congress is considered, the meaning can be satisfactorily discerned."

This Court, after stating the various classes of claimants to the land and the circumstances under which their respective claims arose, said:

> "Congress, under the circumstances, with a view of securing an equitable adjustment of these conflicting claims, enacted the second and third sections of the act."

Without quoting further from the act, this court held that notwithstanding the words of the statute,

> "If the consideration received is still retained by the government the title of the lands thus * * * shall be and is hereby confirmed."

That the act applied to homestead as well as to pre-emption claimants, notwithstanding the proviso relating to the consideration.

The Court also held that notwithstanding the defendant did not apply at the land office to enter his land until after the first day of May, 1888, he having previous to that date been in actual occupation of the land, his title was by the act confirmed.

The Act of July 1st, 1898, when you consider the circumstances under which it was enacted and the purposes sought to be accomplished, indicate what was in the mind of congress when the bill was passed.

Its purpose was the settlement of disputes. In the language of Justice Harland, in Humbird vs. Avery:

> "If the disputes were not accommodated the litigation would become vexatious, extending over many years and causing great embarrassment. In the light of that situation congress passed the Act of 1898, which opened the way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned, the government, the railroad grantees and individual claimants."

The law of 1898 is not like that of any of the land laws. It was passed for a particular purpose and when we recall that purpose it is difficult to believe that congress intended to confine its benefits to purchasers and settlers. The words "claim" and "claimant" appear frequently in this act, and the words are used as distinct and separate from "purchaser" or "settler."

The United States never has asserted any claim to the land other than it belongs to the public domain. Campbell was prevented from acquiring title to the land by reason of the prior claim to the same by the Northern Pacific Railroad Company and by the decision of the officers of the land department. Is

there any legal or equitable reason in the light of the circumstances which existed when the Act of 1898 was passed for excluding parties from the benefit of the act whose claims were initiated in good faith and only were prevented from perfecting their title by the action of the land department, and but for the claim of the railroad company?

It is a well established rule of this court that where an individual in the prosecution of a right has done that which the law requires him to do, and he has failed to attain his right by the misconduct, mistake or neglect of a public officer, the law will protect him.

> Lytle vs. State of Arkansas, 9 How. 333 (13 Law. 160);
>
> Duluth & Iron Range Railroad Company vs. Roy, 173 U. S. 587 (43 Law. 820).

The Railway Company and the defendants in this action now call for a narrow construction of the act; they ask that it be confined to settlers upon the public land. Their attitude is different than at the time the terms of the act were accepted by the company. Shortly after it had accepted the terms of the act the Railroad Company and the defendants in this action were for a wide open construction, but this their broad construction precluded every one from the benefits of the act except the railroad itself and its grantees. Soon after the passage of the act the Railway Company, by conveyance to the plaintiffs in this action, assumed to pass such interest as it had in nearly if not all of its selected lieu lands lying East of Duluth, with the effect as claimed by the defendant and the Railroad Company to withdraw or exempt all of the lands so conveyed from the operations of the act.

The Circuit Court and the Supreme Court of the United States held that this could not be done, but the company, still claiming everything in sight, conveyed certain of its lands to various parties, among which was 40 acres deeded to Chas. Dreschel. This land had been occupied by Sjoli since 1884, claiming it under the homestead law. Sjoli did not acquire his patent until June 1, 1901, the Railroad Company having contested his claim through the land office. Notwithstanding that

Sjoli had acquired his patent the company claimed a vested interest in the land by reason of its selection for lieu land filed in 1883. This court, however, held that the Railroad Company had no vested interest in the land notwithstanding its selections until such selections had been approved by the Secretary of the Interior. As a matter of fact, which is of common notoriety, this Railroad Company and the defendants in this case by contests in the various departments of the office of the Secretary of the Interior and in the courts had striven to wear out all claimants to lands in its selected list, no matter how just or equitable may have been their claim, and notwithstanding the well established rule of this court that the company acquired no vested interests in lieu lands until its selections were approved by the Secretary of the Interior.

The United States Circuit Court of Appeals in this case affirmed the decree of the lower court which dismissed the bill for want of equity and held (P. 413, Vol. 88 U. S. C. C. A.) as follows:

> "In this case Campbell was refused permission to purchase the lands he seeks. He never entered or paid for it. His right to buy was never recognized by the United States, and he was never in privity with it. One who has never by acceptance of a grant, or by settlement and improvement, or by occupation or by entry or by payment placed himself in privity with the United States in title before a patent issues to another, may not maintain a bill in equity to charge the title under the patent with a trust in his favor."

As to this proposition I beg leave to refer to the undisputed facts in the case.

It is admitted in paragraph second of the answer of the defendant, at page 69 of the record, that on the 26th day of October, 1895, Charles B. Campbell applied to the United States District Land Office at Duluth to purchase the land in question, under the provisions of the Act of Congress of June 3, 1878. That he tendered his written statement as alleged with the proper and legal fees to the register and receiver of said land office, and demanded of them to receive and file his application to purchase, and issue notice in accordance with

law, and that such application was refused by the said land office for the reason that it conflicted with the selection filed by the Northern Pacific Company. That said Campbell appealed, and the decision was rendered upon his appeal substantially as alleged in the bill.

It appears in the bill and was established by proof that Campbell renewed his application twice thereafter, with the same result as on his first application, and in each of the subsequent applications appealed, and the decision on each appeal was the same.

In the same paragraph of the answer defendant admits that a patent for the land in question was thereafter issued by the United States, and alleged that it was duly executed on the 13th day of November, 1905. The defendant admits that at the time and before the issuance of said patent to the Northern Pacific Railway Company the patentee had knowledge and notice of the claim of the plaintiff.

This, and further admissions in the answer of the allegations of the bill, clearly establish the fact that Campbell in the prosecutions of his attempt to perfect his title under the Act of 1878, has done all that which the law requires him to do, and it was by reason of the action of the officers of the land department and their disregard of the law that he failed to attain his right.

The fact was established by the undisputed evidence in the case that Campbell was in every way qualified to enter the land under the Timber and Stone Act and except for the wrongful action of the land department would have perfected his title.

The above quoted portion of the opinion by the United States Circuit Court of Appeals in this case is contrary to the rule established by this court in the case of Duluth & Iron Range Railroad Company, plaintiff in error, vs. Joseph Roy, defendant in error, 173 U. S. 587 (43 Lawyers 820). The only difference in the two cases is that Roy was a homestead claimant and Campbell a claimant under the Timber and Stone Act.

The Roy case was an action to determine adverse claims

to real estate and Roy had performed or tendered performance of all acts necessary under the homestead laws to complete his title and it was held:

> "That one who being qualified, settled upon public lands with a bona fide intention of acquiring the same, and when the plat of the survey of the township was filed, went to the land office to enter the land under the homestead laws, and on the denial of his offer instituted a contest which was pending in the general land office when the patent was issued to another by inadvertence and mistake, is entitled to relief against the title claimed under such patent."

I will quote in part the opinion in the Roy case, which includes the facts as follows:

> "The lands were patented to the State of Minnesota by the United States, as swamp and overflowed lands, and the plaintiff in error is the grantee of the state. The defendant in error claims under the homestead laws. At the time of the passage of the Act of 1860, under which the patent was issued, the lands were not swamp, wet, or overflowed, or unfit for cultivation, but were and now are, high, dry and fit for cultivation, except four or five acres in the northwest corner. In May, 1883, the defendant in error, then being qualified to do so, settled upon the lands with the bona fide intention of acquiring the same under the laws of the United States, established his residence thereon and ever since continued to be in the actual, exclusive and notorious possession, making his home there, and cultivating and improving the same. When defendant in error commenced his residence on the lands the plat of the survey of the township in which they were located had not been filed subsequently, and after it was filed, to-wit, on the 2nd of July, 1883, he went to the land office with the intention of entering the lands under the homestead laws, and made a request to do so, but the land officers informed him that there was a mistake in the survey, and that in all probability a new survey would be ordered; that numerous protests had been made against the survey which were sufficient to raise the question of its accuracy; that it was unnecessary for him to protest or file on the land, and advised him to wait until such protests were determined.
>
> He was a foreigner, did not know the English language, nor was he familiar with the laws, rules and regulations relating to the disposition of the public lands, and relief upon the representations of the officers and acted upon their advice.
>
> On the 5th of August, 1884, he discovered that the

state was claiming the lands as swamp lands, thereupon he duly made application to enter the same under the homestead laws, and tendered the fees to the local land officer. No adverse claim other than that of the state had arisen or was made to said lands, but his offer of entry was rejected on the ground that the same had inured to the state under the Act of March 12, 1860, and that his application to enter the lands had not been made within three months after the filing of the township plat in the land office.

On the 6th of August, 1884, he duly filed contest, duly appealed from the rejection of his claim, which appeal and the affidavits attached were transmitted to the commissioner of the general land office, and were by him received and filed September 1, 1884.

On the 23rd of January, 1885, and while the appeal and contest were pending, the lands, through mistake and inadvertence, were patented to the State of Minnesota. The defendants took conveyance of the lands with notice of the right, claim and interest of the plaintiff, defendant in error.

The assignments of error attack the conclusions of the state courts as erroneous, and specify as reasons * * * (e) The defendant in error is not the real party in interest and never had the legal or equitable title to the land, the United States being the only party which could attack the patent to the State of Minnesota, or invoke the action of the courts to determine its validity."

Justice McKenna, speaking for the Court at page 590 (P. 822 Lawyers), said:

"It is now too well established to need argument to support or a citation of authorities, that when a patent is obtained from the United States by fraud, mistake or imposition, the question thence arising becomes one of private right, and the courts in a proper proceeding and in execution of justice will devest or control the title thereby acquired, either by compelling a conveyance to the plaintiff or by quieting his title as against the defendants, and enjoining them from asserting theirs. Germania Iron Co. v. United States, 165 U. S. 379 (41 Law. 754); Williams v. United States, 138 U. S. 514 (34 Law. 1026). It was decided that this power extends to cases in which the patent was issued by inadvertence and mistake, the grounds relied on in the case at bar.

The plaintiff in error, however, contends that the defendant in error cannot invoke this doctrine because he is not in privity with the United States; that he has not proved or offered to prove to it, or established, or alleged even in

this case, the ultimate facts upon which alone his claim could be recognized or its validity established. In other words, that he has not made or has not offered to make final proof.

This contention is attempted to be supported by the principles announced in Bohall v. Dilla, 114 U. S. 47 (29 Law. 61); Sparks v. Pierce, 115 U. S. 408 (29 Law. 428); Lee v. Johnson, 116 U. S. 48 (29 Law. 570). The principles are that to enable one to attack a patent from the government he must show that he himself was entitled to it. It is not sufficient for him to show that there may have been error in adjudging the title to the patentee. He must show that by the law properly administered the title should have been awarded to him.

We do not question these principles, but they only mean that the claimant against the patent must so far bring himself within the laws as to entitle him, if not obstructed or prevented, to complete his claim.. It does not mean that at the moment of time the patent issued it should have been awarded to him. The acts performed by him may or may not have reached that completeness, may not have reached it, and yet justify relief, as in Ard. v. Brandon, 156 U. S. 537 (39 Law. 524); and in Morrison v. Stalnaker, 104 U. S. 213 (26 Law. 741). And because of the well established principle that where an individual in the prosecution of a right has done that which the law requires him to do, and he has failed to attain his right by the misconduct or neglect of a public officer, the law will protect him. Lytle v. The State of Arkansas, 9 How. 333 (13 Law. 160).

It would be arbitrary to apply the principle to some acts and not to others—might destroy it utterly to require the performance of all. But we are indisposed to extend the argument, because we regard Ard. v. Brandon, as decisive.

But it is urged defendant in error may not be able to make final proof, and that the land department, whose jurisdiction is exclusive, may determine the lands not to be swamp or overflowed. That would be contrary to the findings of the court, which show full qualifications in the defendant, and we cannot presume that the land department will find against that fact."

It is conceded that Campbell was prevented from acquiring his title by reason of the prior claim to the same by the Northern Pacific Railroad Company under its selections, and except for this claim Campbell could have perfected his title to the land.

If the complainant Campbell is not protected by the Act of July 1, 1898, we insist that he has a preferential right of purchase, which right was ignored by the land department.

It was held in the case of Sjoli vs. Chas. Dreschel, 199 U. S. 564 (50 Law. 311):

> "That no interest in lands within the indemnity limits of the land grant to the Northern Pacific Railroad Company made by the Act of July 2, 1864, was acquired by that company by virtue of the filing of its list of selections of such lands to supply deficieney within the place limits but such lands remained open as before to settlement or occupation under the pre-emption or homestead laws until the selections were formally approved by the Secretary of the Interior."

This is in confirmation of the repeated decisions of this court.

> Wisconsin Cen. R. R. Co. vs. Price Co., 133 U. S. 496 (33 L. 687);
>
> U. S. vs. Hiss., Kansas & T. Ex. Ry. Co., 141 U. S. 358 (35 L. 766, 771);
>
> Humbird vs. Weyerhauser, 195 U. S. 480 at 506 (49. L. 295 at 298).

The sole reason why Campbell was not permitted by the land department to perfect his title to the land was the alleged prior claim thereto of the Northern Pacific Railway Company. The selection of the land in suit was not approved by the Secretary of the Interior until the 7th day of November, 1905, and the patent therefor was issued six days thereafter. It must be apparent, therefore, that the claim of the Railway Company as against Campbell was void.

Mr. Hoyt in his brief discusses four propositions which I have not mentioned. They are as follows:

1. The lands lying East of Duluth claimed by the appellee are not within the grant of the Railway Company.

2. If they were originally within the grant the selections were cancelled by the order of July 6, 1896, and March 22, 1897.

3. Under the Act of July 2, 1864, the Northern Pacific Railway Company was limited to ten alternate sections of land

per mile on each side of its railroad wherever it passed through a state and there was no authority in the grant to issue patents for land to the Railway Company on the north side of its line of road in lieu of lands deficient on the south side of the road, and such patents are void.

4. The Northern Pacific Railway Company is not the successor of the Northern Pacific Railroad Company, and the appellees have failed to prove title to the land in suit.

I endorse each and all of the foregoing propositions, but will not take the time of the court in discussing them here, all of which are

Respectfully submitted,

M. H. STANFORD,
Counsel for Appellant.

Dated, March 22, 1910.

SUPREME COURT OF THE UNITED STATES.

October Term, 1909.

FREDERICK WEYERHAEUSER and
JOHN A. HUMBIRD,
Appellants,

vs.

HERBERT H. HOYT,
Appellee.

No. 195.

CHARLES D. CAMPBELL,
Appellant,

vs.

FREDERICK WEYERHAEUSER and
JOHN A. HUMBIRD,
Appellees.

No. 176.

SUPPLEMENTAL BRIEF.

Mr. Bunn has discussed the foregoing cases in one brief, and his entire argument is based on the following proposition, quoting from page 17 of his brief:

"Such a selection filed and recorded, as it was, against this land in the land office, the land department has uniformly regarded as an entry and as having the same effect to segregate the land from the general bulk of public lands that any other entry has."

The foregoing construction claimed by Mr. Bunn for the land department cannot be regarded in any other light than a disregard of the law as settled by the repeated decisions of this court.

An entry is for a specific tract of land.

Said Justice Swayne, speaking for the court in the case of Ryan vs. Central Pacific R. R. Co., 99 U. S. 9 Otto 382 (25 Law. 305):

"With respect to the "lieu lands" as they are called, the right gained by selection was only a float, and attached to no specific tracts."

Said Justice Miller, speaking for the court in the case of St. Paul and Sioux City Railroad Company vs. Winona, 112 U. S. 720 (28 Law. 872):

"Until a valid selection by the grantee is made from the lands within the indemnity limits they are entirely open to disposition by the United States or to appropriation under the laws of the United States for the disposal of public lands."

Said Justice Field, speaking for the court in the case of Wisconsin Central Railroad Co. vs. Price County, 133 U. S. 495 (33 Law. 687):

"Until selections were approved there were no selections in fact."

Said Justice Brown, speaking for the court in the case of New Orleans Pacific R. Co. vs. Parker, 143 U. S. 42 (36 Law. 66):

"As to the lands within the indemnity limits, it has always been held that no right is acquired until specific parcels have been selected by the grantee and approved by the Secretary of the Interior."

The same is held in,

Humbird vs. Avery, 195 U. S. 480 (49 Law. 286).

This doctrine is affirmed in the late case of,

Sjoli vs. Dreschel, 199 U. S. 564 (50 Law. 311).

The only difference between the last case cited and those at bar is that the plaintiff Sjoli made a homestead entry, while Campbell and Hoyt were applicants for purchase under the Timber and Stone Act.

I think on general principles of law, the Railroad Company acquired no right as against Campbell and Hoyt to the land in controversy. That when their respective applications for purchase were made the land was subject to entry and purchase under the Timber and Stone Act.

This court has universally held that *when lands have once been sold by the United States and purchase money paid the lands so sold is segregated from the public domain, and are no longer subject to entry. A subsequent sale and grant of the same lands to another person will be absolutely null and void.*

Simonds vs. Wagner, 11 Otto 260 (25 Law. 91);
Works vs. Brauson, 11 Otto 260;
Frisbie vs. Whitney, 9 Wall. 76 U. S. 987 (19 L. 666);
Lytle vs. Arkansas, 9 How. 314.

Where the right to a patent has once become vested in a purchaser of public lands it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete, are the mere ministerial acts of the officers charged with the duty.

Stark vs. Starr, 6 Wall. 73 U. S. 402 (18 Law. 925);
Simonds vs. Wagner, 11 Otto 260 (25 Law. 911);
Lindsey vs. Hawes, 67 U. S., 2 Black 554 (17 Law. 265);
Cornelius vs. Kessel, 128 U. S. 456 (32 Law. 482);
U. S. vs. Detroit Lumber Co., 200 U. S. 335 (50 L. 505).

These cases also hold that the officers of the land department have no authority to cancel an entry unless fraudulent or unauthorized.

Nothing remained to be done in the Hoyt case except the mere ministerial act of issuing the patent. He was a purchaser

entitled to a patent. The land department, without authority of law, cancelled his claim and patented the land to the appellant.

In the Hoyt case there seems to be no reason why the decision of the Court of Appeals that the defendants Weyerhaeuser and Humbird held the title to the land in controversy as trustees for the benefit of the complainant Hoyt should not be affirmed.

In the Campbell case it is established and not disputed that Campbell had done all that the law required him to do and that he failed to attain his right because of the unlawful action of the officers of the land department. It differs from the Hoyt case only in degree. The officers of the land department permitted the applicant to proceed further towards the prosecution of his right in one case than it did in the other. The Campbell case should be reversed and the relief prayed for granted.

CASES CITED BY THE UNITED STATES CIRCUIT COURT OF APPEALS.

The case cited by the Court of Appeals in the Campbell case do not support the position of that court.

In Smelting Company vs. Kemp there cited the court says, after affirming the general rule as to the conclusiveness of a patent:

> "Of course, when we speak of the conclusive presumption attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it."

And again, in the same case at page 879:

> "A patent may be collaterally impeached in any action and its operation as a conveyance defeated by showing that the department had no jurisdiction to dispose of the land; that is, that the law did not provide for selling them or that they had been reserved for sale, or dedicated for special purposes or had been previously transferred to others."

Beard vs. Federy, 3 Wall. 478 (18 Law. 88), cited by the Court of Appeals, related to a Mexican land grant, and the

authority of a certain board appointed by act of congress to pass upon such grants.

CASES CITED BY MR. BUNN.

The cases cited by Mr. Bunn in support of his contention that this court did not mean that which is clearly expressed in Sjoli vs. Dreschel, and numerous other decisions of this court to the same effect. None of the cases cited by Mr. Bunn have any aplication to the cases at bar.

Gertgens vs. O'Connor, 191 U. S. 237 (48 Law. 163). O'Connor's title was not derived through the land grant but by virute of Section 5 of an act of congress of March 3, 1887. United States Compiled Statutes 1901, p. 1595. The land was the property of the government. Selections had been made by the Railroad Company, but not approved. Ireland had acquired the right to purchase from the company certain of these lands when the Railroad Company should acquire title thereto. The act of congress in question authorized Ireland to purchase the land covered by the contract with the Railroad Company from the government, paying to the government its price, no portion of which was to go to the Railroad Company. It was this Act of March 3, 1887, which cut out the claims under the settlement laws, and not the approval by the Secretary of the Interior of the selections prior thereto made by the Railroad Company.

United States vs. Detroit Lumber Company, 200 U. S. 231, was a case where the United States sought to set aside certain patents upon the ground that they were fraudulently acquired under the homestead laws. The receiver's receipts had been issued but not the patents. The only question decided in that case was that there were no circumstances disclosed which cast suspicion upon those rights in the hands of the lumber company. That a purchaser from the patentees for value and without notice of any fraud on the part of the entryman is a bona fide purchaser within the meaning of the Timber Act of July 3, 1870, and the doctrine of relation applied.

McCreery vs. Haskell, 119 U. S. 327 (30 Law. 408), cited

by Mr. Bunn in support of the rule "First in time first in right" involved lands selected by the state in part satisfaction of Section 16 of one of the townships of the county which was within the limits of the confirmed Mexican grant.

By the Act of Congress of March 3, 1853, making public lands of California with certain exceptions subject to the general pre-emption laws of September 4, 1841, Sections 16 and 36 of each township were granted to the state for the purpose of public schools.

The land in question was within the claimed limits of a Mexican grant, and could not be identified until after they were surveyed by the surveyor general of the United States.

The court held as follows:

> "For selections of lands in Calofornia in lieu of the school sections covered by Mexican grants, it has not been the practice of the land department to issue patents. When the selections are approved by the Secretary of the Interior a list of them with a certificate of the commissioner of the general land office is forwraded to the state authorities. The list thus certified operated to convey the title to the state as fully as by patent."

The land in this case was originally granted to the state; if the land had been surveyed it would have passed by the grant. The selection was made prior in time to that of the pre-emption claimant and this selection vested the equitable title in the state requiring only the certificate of the commissioner of the general land office to pass the legal title, hence the decision in that case as between the state and the settler, "First in time, first in right," an altogether different title from that claimed by the Railroad Company and selected to satisfy the deficiencies in its grant.

ACT OF JULY 1, 1898.

Mr. Bunn follows the Court of Appeals in both cases in which he holds that neither Hoyt nor Campbell are entitled to the benefit of that act. Mr. Bunn further declares that Campbell is not entitled to the benefit of that act for the reason that he has no entry of record against the land.

We claim for this Act of July 1, 1898, that it refers dis-

tinctly to three classes of persons, purchasers, settlers and claimants, who in good faith initiated their claim prior to January 1st, 1898, under any of the land laws of the United States to any lands either in the granted or indemnity limits of the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor has claimed to have attached by selection.

The contention of Mr. Bunn amounts to this: That under any and all circumstances the land department by an unlawful and unauthorized act by its officers and without authority of law may cut off the right of any claimant to any of these lands by denying to them the right to enter or pursue their entry under the land laws of the United States.

If this construction placed on the act by Mr. Bunn is held to be correct the Act of July 1, 1898, need never have been passed. Such construction means this and nothing more: That it is within the power of the land department in any and all cases to nullify the intention of congress as expressed in the act.

In each case the claim to the land was initiated in good faith prior to January 1, 1898, and in the absence of the Railroad Company's claim could have been perfected into a full title. The lands were open for sale when their respective applications were made. The claimants did everything in their power to perfect their rights and title to the land. Each by his act and effort attained a legal right to be preferred. The claim of each was good against every one but the one claiming the prior right, which in these cases was the Northern Pacific Railway Company only, and the Act of July 1, 1898, extinguished the claim of the Railway Company.

Mr. Bunn does not meet the following points made by Mr Hoyt in his respective briefs:

1. There was no authority in the grant to the Railroad Company to issue patents for land on the north side of its road in lieu of lands deficient on the south side of its road and such patents are void.

2. The Northern Pacific Railway Company is not the

successor of the Northern Pacific Railroad Company, and Weyerhaeuser and Humbird have not proved title in themselves to the lands in controversy.

As to the foregoing propositions, I would respectfully refer the court to the brief of H. H. Hoyt, filed in these cases.

Dated, March 29, 1910.

M. H. STANFORD.

Supreme Court of the United States

OCTOBER TERM, 1910.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD,

Appellants,

vs.

HERBERT H. HOYT.

No. 24.

Office Supreme Court U.
FILED
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JAMES H. McKENNEY,
Clerk

CHARLES D. CAMPBELL,

Appellant,

vs.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD.

No. 12.

NORTHERN PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

vs.

FRED WASS and PAULINE WASS.

No. 181.

BRIEF FOR APPELLANTS IN No. 24, APPELLEE In No. 12 AND PLAINTIFF IN ERROR IN No. 181.

CHARLES W. BUNN.

Supreme Court of the United States

OCTOBER TERM, 1910.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD,

Appellants,

vs.

HERBERT H. HOYT.

No. 24.

CHARLES D. CAMPBELL,

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FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD.

No. 12.

NORTHERN PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

vs.

FRED WASS and PAULINE WASS.

No. 181.

STATEMENT OF FACTS.

The three cases above entitled are so far alike that they will be discussed in one brief. The Hoyt and Campbell cases are appeals from the United States Circuit Court of Appeals for the Eighth Circuit (re-

ported below 161 Fed. Rep. pp. 324 and 332 respectively.) The Wass case is a writ of error to the Supreme Court of Minnesota. The decision of that court followed the decision of the Circuit Court of Appeals in the Hoyt case and is reported 104 Minn. 411. The cases were argued at the last term and have been ordered restored to the docket for reargument.

Hoyt claims forty acres and Campbell one hundred and sixty acres of land in Minnesota under the timber and stone law and Wass claims one hundred and sixty acres of land in the same state under the homestead law. Weyerhaeuser and Humbird are purchasers from the Northern Pacific Railway Company. They claim the lands involved in the Hoyt and Campbell cases under the acts of Congress making grants to the Northern Pacific Railroad Company; and the Northern Pacific claims the land involved in the Wass case under the grants made to the Territory of Minnesota by the act of Congress approved March 3, 1857 (11 Stat. 195) and the act of Congress approved March 3, 1865 (13 Stat. 526) as amended by the act of Congress of March 3, 1871 (16 Stat. 588). All three parcels of land were, by the land department of the United States, decided to belong to the railroad grants and patent for reach parcel was issued and delivered to the Railway Company. The Hoyt and Campbell cases were commenced by bills in equity in the Circuit Court of the United States; in the Hoyt case the prayer is to charge Weyerhaeuser and Humbird as trustees of the legal title and to compel them to convey, whilst in the Campbell case alternate relief is also prayed, namely, that the patent be canceled so as to leave title in the United States open to plaintiff's application to

purchase. The Wass case is an action of ejectment brought in the state court by the Railway Company against Wass to recover possession of the premises. In the Hoyt and Campbell cases the record shows over $2,000 to be involved in each suit.

We can best explain the facts to the court by stating the Hoyt case and differentiating the Campbell and Wass cases. The following statement of facts in the Hoyt case applies to all the cases, except as otherwise specified, and our references to the record, except where otherwise stated, are to the transcript in the Hoyt case.

Hoyt asserts that his grantor entered the land under the timber and stone law, which provides for a cash purchase and does not require settlement, and that the United States illegally denied his entry and patented the land to the Northern Pacific Rail*way* Company (successor of the Northern Pacific Rail*road* Company) which conveyed to Weyerhaeuser and Humbird.

The land lies in Minnesota within what is known as the "second indemnity limits" of the Northern Pacific Railroad Company. Let us explain what the "second indemnity limits" are:

Sec. 3 of the Northern Pacific Railroad charter of July 2, 1864, says:

> "*And be it further enacted*, that there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral,

> designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections * * *"

This law granted *in the states* the odd sections in a strip of country forty miles in width (twenty on each side of the railroad), which strip of country is called the "place limits," or "granted limits."

It established on each side of the place limits an indemnity belt ten miles in width, within which might be made good by selection lands lost to the company in the place limits. It says, "other lands shall be selected by the company in lieu thereof, *under the direction of the secretary of the interior*, in alternate sections and designated by odd numbers." This language creates what are called the "first indemnity limits."

Under this act place land losses, wherever occurring, were to be made good *anywhere* within the indemnity belt, regardless of state or territorial lines.

And it is admitted law that the losses so to be made good include place lands reserved or disposed of by the United States, or covered by claims, *either before or after the passage of the act,* down to the date of definite location of the railroad.

By the joint resolution of May 31, 1870, amending the Northern Pacific grant of 1864 it is provided:

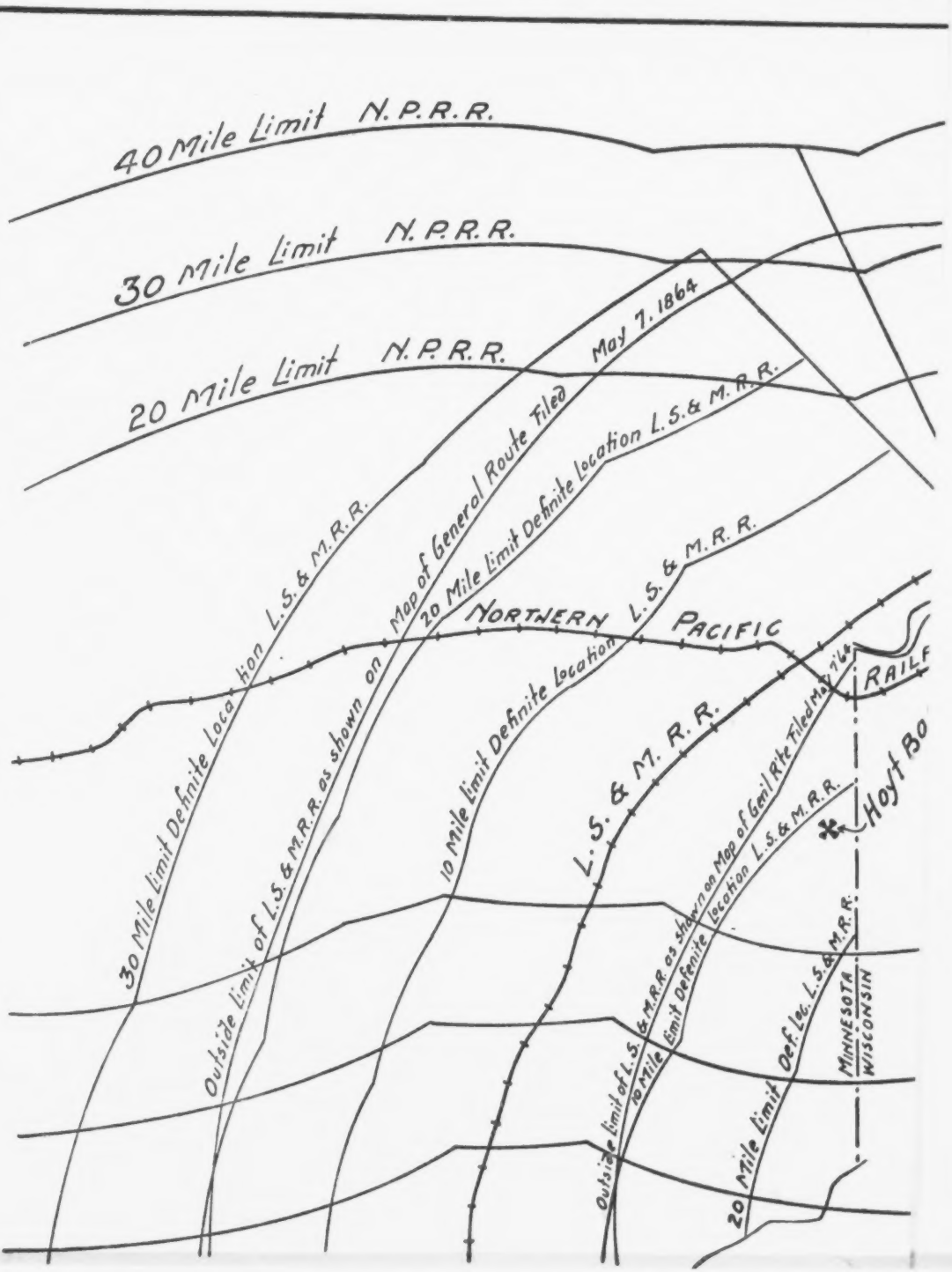
> "And in the event of there not being in any state or territory, in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four * * *"

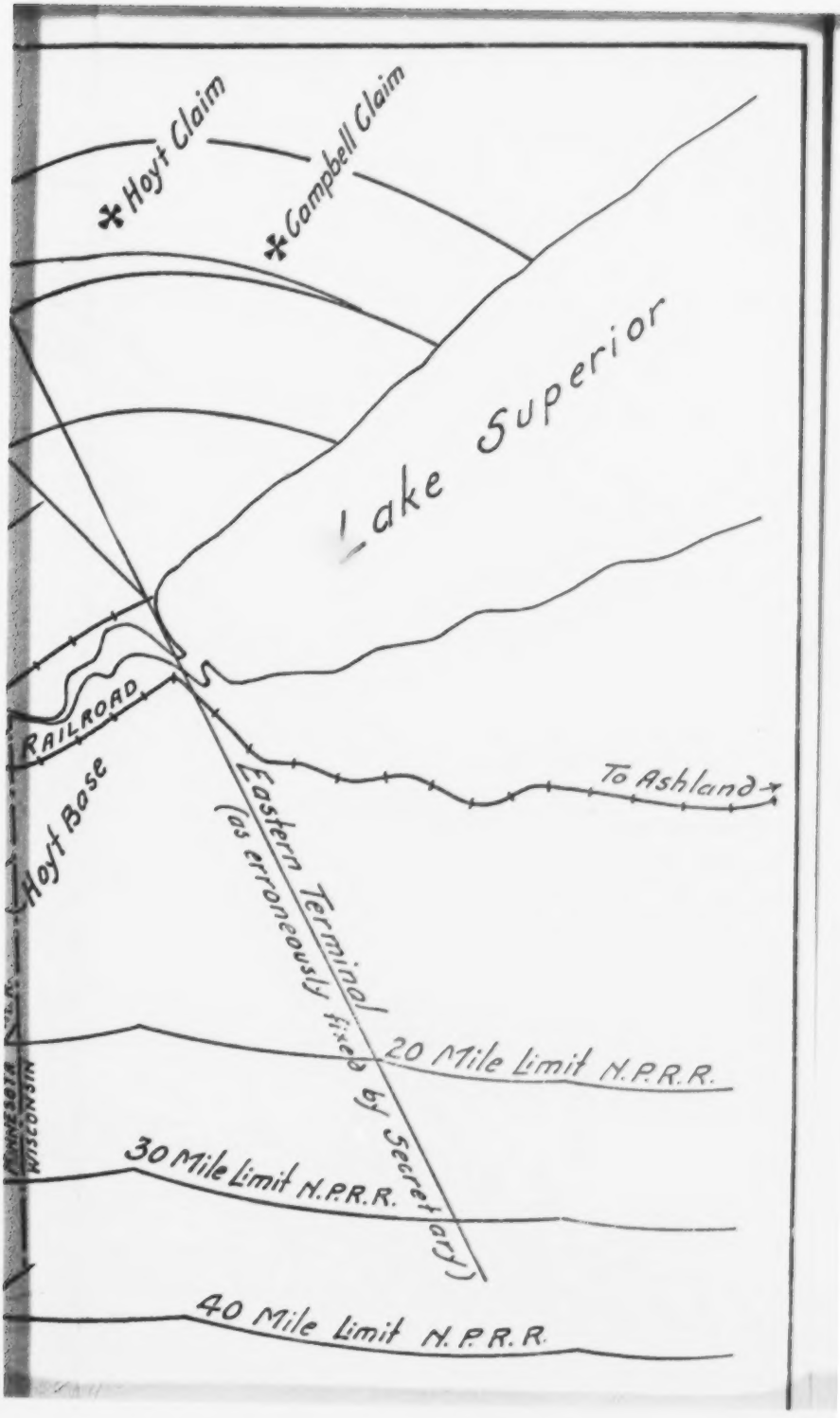
This resolution established "second indemnity limits," viz., two strips of land each ten miles wide, one lying on each side of the road outside the "first indemnity limits." The second indemnity region is unlike the first in this: (a) it can be resorted to only for losses *in the same state or territory;* and (b) only for losses occurring *after* the act of July 2, 1864, and prior to definite location.

The title of the Railroad Company to indemnity lands within either indemnity "limit" rests upon *selection approved by the Secretary of the Interior. Humbird v. Avery,* 195 U. S. 480.

The land in suit was selected by the Railroad Company October 17, 1883. The selection list specified losses in bulk, *i. e.,* it stated the losses by specific descriptions and the selections by specific descriptions, each footing up the same number of acres, but did not assign each selection to a particular loss. At the time the list was filed it conformed in this respect to the rule of the department. The list was received by the Register and Receiver and transmitted to the general land office. April 11, 1893, the Railroad Company, acting under direction of the Secretary of the Interior, rearranged the selection list so as to specify a praticular tract lost as the basis for each selection. In the rearranged list there was set opposite the tract in controversy in the Hoyt case the NW¼ of NE¼ of section 11, township 46 north, range 16 west, in Minnesota. The last described land was the land lost furnishing the basis of the selection and it was within the *place* limits of the Northern Pacific grant, but also in the *indemnity* limits of the grant to the State of Minnesota for the Lake Superior and Mississippi Company (act of May 5, 1864), and under the act last mentioned had been selected by and was approved for patent to the state March 26, 1868.

The record is quite voluminous but most of the material facts are set forth in the opinion of the Secretary of the Interior deciding *Jones v. Northern Pacific* (the identical case of Hoyt now here). This


40 Mile Limit N.P.R.R.
30 Mile Limit N.P.R.R.
20 Mile Limit N.P.R.R.
May 7. 1864
Map of General Route Filed
20 Mile Limit Definite Location L.S.& M.R.R.
30 Mile Limit Definite Location L.S.& M.R.R.
NORTHERN PACIFIC RAILR
10 Mile Limit Definite Location L.S. & M.R.R.
L.S. & M. R.R.
Outside Limit of L.S. & M.R.R. as shown on Map of Genl Rte Filed May 7/64
Location L.S. & M.R.R.
Hoyt Bo
Outside Limit of L.S. & M.R.R. as shown on Map of Genl Rte Filed
10 Mile Limit Definite
Def. Loc. L.S. & M.R.R.
MINNESOTA
WISCONSIN
20 Mile Limit


Hoyt Claim
Campbell Claim
Lake Superior
RAILROAD
Hoyt Base
Eastern Terminal
(as erroneously fixed by Secretary)
To Ashland
20 Mile Limit N.P.R.R.
30 Mile Limit N.P.R.R.
40 Mile Limit N.P.R.R.
MINNESOTA
WISCONSIN

Carlton
Carlton
Terminal
Superior
MINNESOTA
WISCONSIN

Superior
HERN PACIFIC RAILROAD
Ashland
Ashland Terminal
Terminal

opinion is set forth as an exhibit to Hoyt's complaint. (Transcript pp. 33-41.)

The Hoyt and Campbell cases could not have arisen but for the mistake of law of the land department of the United States in holding that the eastern terminus of the Northern Pacific grant was at Duluth, instead of at Ashland as asserted by the Railroad Company. This mistake was corrected and the eastern terminus decided to be at Ashland in *Doherty v. Northern Pacific Railway Company*, 177 U. S. 421, and *United States v. Northern Pacific Railroad Company*, id. 435. The lands involved in both the Hoyt and Campbell cases lie in Minnesota but opposite to that part of the Northern Pacific road east of Duluth. See maps opposite.

Pursuant to the Secretary's decision of August 27, 1896 (23 L. D. 204) holding that the grant terminated at Duluth the Hoyt and Campbell selections, March 22, 1897 had been ordered cancelled; but the order directing cancellation was put expressly on the erroneous ground that the lands were east of Duluth. After the decisions of this court above cited the selections were reinstated. After the order directing cancellation and before the selections were reinstated, to-wit, on December 17, 1897, Richard B. Jones filed his application as below stated and made his final proof on the 10th of December, 1898. But before the date last named the land was withdrawn from all entry by virtue of the departmental order of February 28, 1898 (26 L. D. 265) which order was made to preserve the selections and the existing status of all entries until this court should decide the then pending cases above referred to (Transcript pp. 33, 34).

Before this court corrected the Secretary's error as to the eastern terminus, Richard B. Jones made an application to enter the land involved in the Hoyt case under the act of Congress approved June 3, 1878, as amended by act of August 4, 1892, commonly known as the "timber and stone law." December 10, 1898, Jones filed his proofs and paid to the Receiver one hundred dollars, being the purchase price of the land, and thereupon received a receiver's receipt, across the face of which was written: "Subject to any claim the Northern Pacific Railroad Company may have to the land herein described." The Railroad Company's selection had then been fifteen years of record in the land office against this land, of which fact Jones, when he offered his proofs and money, had emphatic notice. He also was then notified that the land was withdrawn awaiting the result of litigation (Transcript pp. 13, 14, 15, 33, 34). By special warranty deed dated December 19, 1908, Jones conveyed to Minnie Stewart; and on March 22, 1902, Minnie Stewart conveyed to the complainant Hoyt.

The decisions of this court holding the eastern terminus to be at Ashland were announced in April, 1900. On the 2nd of December, 1901, the Commissioner of the General Land Office, on appeal from the action of the local land officers allowing the Jones entry, directed a cancellation of that entry because of the prior selection of the Railway Company. On appeal the Commissioner's decision was affirmed by the Secretary of the Interior August 30, 1905. The Secretary then approved the Railroad Company's selections of the lands involved in the Hoyt and Campbell cases, and on October 18, 1905, patent for these lands issued

to the Northern Pacific Railway Company (Transcript pp. 9, 103), which company conveyed by warranty deed to Weyerhaeuser and Humbird.

The case of Campbell is in all of its facts like the case of Hoyt—except that in the Hoyt case the plaintiff's assignor paid his money to the Receiver of the Land Office, taking a receipt in terms subject to the Railway Company's rights, whilst Campbell's application to enter, made October 26, 1895 (Transcript Campbell Case p. 4), was rejected by the land officers and his case stands upon that rejection, he never having tendered his proofs or payment for the land or done anything farther but to allege in his bill a quite uncertain and indefinite willingness and readiness to pay (Transcript Campbell Case pp. 5-9, 18, 19). The Campbell case differs from the Hoyt case in one other respect, namely, that the lost land furnishing the selection basis lies farther west in Minnesota and is not, like the land in the Hoyt case, within indemnity limits of the Lake Superior and Mississippi grant.

The land involved in the Wass case is within the indemnity limits of the grants to the Territory of Minnesota made in the acts of Congress above referred to. The State of Minnesota conferred the benefit of these grants on the Western Railway Company of Minnesota by legislative act of March 1, 1877. This company filed a selection against the land in suit on the 31st day of December, 1877, and on the 4th of December, 1889, the St. Paul and Northern Pacific Railway Company (successor in interest to the Western Railway Company) filed in the land office an amended selection list assigning for each selection a particular and described loss. The matter appears to have stood

without action in the land department until ten years later when, in the month of April, 1899, Fred Wass entered upon the land with the intention of making it a homestead and has ever since been in possession. On the 4th of December, 1899, Wass presented to the land office an application to enter under the homestead laws. The Register and Receiver filed his application, but on the same day rejected it and refused to receive the fees tendered, basing such refusal and rejection upon the ground that the lands filed for were embraced in the then pending though unapproved selection of the St. Paul & Northern Pacific Railway Company. Wass appealed and the action of the local land office was affirmed by the Commissioner of the General Land Office and by the Secretary of the Interior respectively. Thereupon the Secretary of the Interior on February 16, 1905, approved the selection of the Railroad Company and on March 15, 1905, issued patent to the State of Minnesota, the state issuing its patent in turn to the Wesern Railway Company of Minnesota. All rights under the patent have become vested in the Northern Pacific Railway Company the plaintiff in error. The selection right under the grant to the Territory of March 3, 1857, appears to be identical with that under the Northern Pacific act of July 2, 1864, section 1 of the 1857 act (11 Statutes at Large 195) giving the right of selection "Subject to the approval of the Secretary of the Interior." The facts in the Wass case are set forth in the answer of Wass (Transcript in No. 181, pp. 6-10).

Hoyt and Campbell seek in their bills to cast a doubt upon the right of the Northern Pacific Railway Company, which is a Wisconsin corporation, to claim as

successor in title to the Northern Pacific Railroad Company, the federal corporation, alleging that under the acts of Congress the Rail*road* Company had no power to execute more than one mortgage, and alleging (or leaving it to be inferred) that the Railway Company's title came through foreclosure of a *second* mortgage made by the Rail*road* Company. But the answer and proofs show that the land grant lands, including those in suit, of the Northern Pacific Railroad Company lying in Minnesota were never covered by *any* mortgage executed by the Rail*road* Company but on the contrary were purchased by the Railway Company under decrees of the United States Court for the District of Minnesota in a general creditor's suit.

The same plaintiffs set up certain legislation in Wisconsin creating the Superior & St. Croix Railway Company, and allege that the Northern Pacific Railway Company is *successor* of the Superior & St. Croix; and that under the Wisconsin legislation the Northern Pacific Railway Company has no right to take or hold any lands not necessary for the operation of its railroad. But the bills and answers make it plain that the Northern Pacific Railway Company is the Superior & St. Croix Company, and not its successor, the change being one of name. The act of Wisconsin of 1895, sec. 7, clearly gives the company the power to purchase the land in suit.

QUESTIONS IN THE CASE.

Proper errors are assigned in each case to cover the questions below stated.

A question common to all the cases and one which we think is decisive is: Whether, a floating right be-

ing granted by Congress to select land subject to the approval of the Secretary, being fastened to a particular parcel by entry on the land books, by filing proof of right with the Secretary, and by doing everything that the law requires, such selection will absolutely be annulled by an application for the same parcel under a law for disposal of the public domain, filed while the Secretary is examining and considering the selection right. We assert that in such cases a rule of clear justice, well settled in the decisions of this court, applies, which is, that the selection is preserved until passed upon by the Secretary, who has jurisdiction to approve it, and that when approved the selection is effective from its inception to cut out applications filed subsequently.

The suit of Hoyt was decided by the Circuit Court of Appeals in his favor, on the ground that the Secretary of the Interior's approval of the Railway Company's selection and the patent to the Railway Company were without authority and void; that the Secretary had no discretion or right to approve this selection, it not having been acted upon when Hoyt's grantor applied to purchase, but was by such application to purchase deprived of all jurisdiction and right to consider the selection and absolutely bound by law to grant the application to purchase; that for this reason the appellants hold their title under the patent as trustee for Hoyt and should be decreed to convey to him.

The Circuit Court of Appeals decided the Campbell case the other way, distinguishing it from the Hoyt case, in that the Receiver of the land office refused to accept Campbell's application and proofs, whilst he did receive the application and proofs and took the

money of Hoyt's grantor (though at the same time advising him of the Railway Company's claim on file and giving him a receipt for his money across the fact of which was written "Subject to any claim the Northern Pacific Railroad Company may have to the lands herein described"). That Hoyt's grantor actually paid his money to the Receiver of the land office and filed his proofs, in the opinion of the Circuit Court of Appeals, segregated the land from the public domain, so that the Secretary could not after that approve the selection; whilst Campbell's money and proofs the land officers refused to receive, thus leaving the land free of any claim of record; and being so free of claims of record the Circuit Court of Appeals held left the selection under the Secretary's jurisdiction.

In the Wass case the application was not to make a cash purchase but to obtain the land as a homestead. The land officers wholly rejected the application and refused to accept the fees required by law and refused to enter application of record in the land office.

The controlling proposition held by the court below in the Hoyt case is, that notwithstanding the grantee under an act of Congress has suffered a loss and has done everything possible to make selection of indemnity therefor according to law, such selection is ineffective without approval by the Secretary of the Interior: and *that the Secretary cannot legally grant that approval after an application for the land under any public land law, notwithstanding the selection was the first entry, either attempted, or of record in the land office, and notwithstanding the land was free public land subject to the selection at the time of its filing.* In the Campbell and Wass cases the local land

office had refused *in toto*, in the Campbell case the application to purchase, and in the Wass case the application to homestead. The Hoyt case differs only in the fact that the local land officers erroneously took the applicant's money and filed his entry advising him distinctly that this was subject to the Railroad Company's rights. The Circuit Court of Appeals on this difference in facts decided the Hoyt case against the Railway Company's grantees and the Campbell case for them, whilst the Supreme Court of Minnesota in the Wass case reluctantly followed the Circuit Court of Appeals in the Hoyt case, in effect overruling its own previous decisions in *McHenry v. Nygaard*, 72 Minn. 2, and *Sage v. Swenson*, 64 Minn. 517, though the facts in the Wass case seem like those of the Campbell rather than the Hoyt case.

Opposing counsel in the Hoyt and Campbell cases assert however other propositions (mostly immaterial to the Wass case) which must be noticed. He says:

1. That the Northern Pacific *Railway* Company, as distinguished from the Northern Pacific *Railroad* Company, could take no title, because (a) it did not succeed to the rights of the *Railroad* Company touching the land in suit, (b) the act of Wisconsin of 1895, constituting the charter of the *Railway* Company, section 7 of which confers the right to buy the Northern Pacific grant, is unconstitutional, as being special legislation.

2. That the loss which was the basis of the selection in the Hoyt suit was not a good loss, because not within the Northern Pacific place or granted lands, by force of the provisio in section 3 of the Northern Pacific grant reading: "*Provided*, that if said route

shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line the amount of land heretofore granted shall be deducted from the amount granted by this act." The assertion is, that the Lake Superior and Mississippi grant and the Northern Pacific grant were upon the same general line, and that by reason of the language quoted the lands falling within the grant to the Lake Superior and Mississippi Company were to be deducted from that to the Northern Pacific.

3. That should the last assertion be unsound counsel still contends that the lost lands furnishing the basis of selection in the Hoyt case, even if within the Northern Pacific granted limits, being appropriated to an earlier grant, namely, one of May 5, 1864, may furnish a good basis, for *first* but not for *second* indemnity selections under the Northern Pacific grant; having been, it is asserted, lost to that grant *before* its passage.

4. That the Railroad Company's selections of the lands in suit were irregular, informal, or invalid, because (a) made originally without the assignment to each particular selection of some specific and described loss, and (b) that the loss and the lands selected in lieu thereof were upon different sides of the track (which is true in the Hoyt and Campbell cases).

5. That the land involved in the Hoyt suit falls within the provisions of the sundry civil bill of July 1, 1898, and should under that bill have been awarded by the Secretary of the Interior to the claimant adverse to the Railway Company.

ARGUMENT.

1. We shall attempt first to show, that the Circuit Court of Appeals erred in holding in the Hoyt case the Secretary's approval of our selection to be beyond his jurisdiction and void.

This conclusion is reached only by saying (as the Circuit Court of Appeals did say) that the entry at the land office of Hoyt's grantor Jones made Jones "from the moment of that purchase" "the owner of the entire beneficial interest in and equitable title to it" leaving in the United States "the naked legal title which it held in trust for him."

But we submit this is begging the whole question, which is whether the entry of Jones did make him the equitable owner. If it did there is an end of the case. But the very question is whether Jones got any rights, and if so what rights, by his entry subject to the selection. To determine this question we cannot start with his entry, but must look at the events touching this title in the order of time.

And in the order of time we find first that the Northern Pacific, having suffered a loss (as we shall try to show later) entitling it to select indemnity, found this piece of vacant public land, against which there were no claims or rights, of record in the land office or otherwise; and on the 17th day of October, 1883, it entered a selection of that land at the land office. If followed up the selection and some years later altered its form to comply with new regulations of the department.

A selection filed and recorded as this was, against this land in the land office, the land department has uniformly regarded as an *entry* and as having the same

effect to segregate the land from the general bulk of public lands that any other entry has. *Porter v. Landrum*, 31 L. D. 352; *Southern Pacific Railroad Co.*, 32 L. D. 51; *Santa Fe Pacific Railroad Co.*, 33 L. D. 161; *Eaton, et al., v. Northern Pacific Railway Co.*, 33 L. D. 426; *Santa Fe Pacific Railroad Co. v. Northern Pacific Railway Co.*, 37 L. D. 669. The well settled rule is stated as follows by the then Assistant Attorney General (Mr. Justice Van Devanter) in *Southern Pacific Railroad Company*, 32 L. D. 51:

> "Under this legislation the company was, by the direction or regulations of the Secretary of the Interior, required to present at the local land office selections of indemnity lands, and these selections, when presented conformably to such direction or regulations, were to be entertained and noted or recognized on the records of the local office. When this was done the selections became lawful filings; and while, until approved and patented, they would remain subject to examination, and to rejection or cancellation where found for any reason to be unauthorized, they, like all other filings, were entitled to recognition and protection so long as they remained undisturbed upon the records.
>
> There is no question in this case as to the sufficiency of the loss assigned, or as to the formality and regularity of the selection.
>
> What effect has been given to a pending railroad indemnity selection?
>
> Prior to 1887 the rights of a railroad company within the indemnity belt of its grant were protected by executive withdrawal, but on August 15, that year, these withdrawals were revoked, and the land restored to settlement and entry; but such orders, although silent upon the subject, were held not to restore lands embraced in pending selections. (*Dinwiddie v. Florida Railway*

> *& Navigation Co.*, 9 L. D. 74). In the circular of September 6, 1887 (6 L. D. 131), issued immediately after the general revocation of indemnity withdrawals, it was provided that any application thereafter presented for lands embraced in a pending railroad indemnity selection, and not accompanied by a sufficient showing that the land was for some cause not subject to the selection, was not to be accepted, but was to be held subject to the claim of the company under such selection. In fact, a railroad indeminty selection, presented in accordance with departmental regulations and accepted or recognized by the local officers, has been uniformly recognized by the land department as having the same segregative effect as a homestead or other entry made under the general land laws."

This is not saying that the selection before approval by the Secretary confers the least right or title, and is therefore entirely consistent with *Humbird v. Avery*, 195 U. S. 480. But that the selection duly recorded at the land office is an entry, which may ripen into title if afterwards approved by the Secretary, is a proposition, not only uniformly held by the land department, but well established by decisions of this court.

In *Oregon & California Railroad Company v. United States*, 189 U. S. 103, Mr. Justice Harlan delivering the opinion ruled upon the precise point, saying (p. 112):

> "Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits—which interest relates back to the date of the granting act—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company

> acquires no interest in any specific sections until a selection is made with the approval of the Land Department; and then its right relates to the date of the selection."

In *Shepley v. Cowan*, 91 U. S. 330, the court considered a conflict between a pre-emption claim and a selection on behalf of the State of Missouri under an act of Congress conveying to the state five hundred thousand acres of land *to be selected* by the Governor, the act providing that if the selection should be approved by the Secretary patents were to issue. The court (p. 337) said touching conflicts between such right of selection and a pre-emption:

> "The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a State selection takes effect as of the time when the selection is made and reported to the land office; and the patent upon a pre-emption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land-office."

On page 338, after distinguishing *Frisbie v. Whitney*, 9 Wall. 187, and *Yosemite Valley Case*, 15 id. 77, the Court said:

> "But whilst, according to these decisions, no vested right as *against the United States* is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be

> preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

The exact proposition was the basis of decision in *McCreery v. Haskill*, 119 U. S. 327. In that case the State of California had the right to select lands, the act requiring the selection before becoming effective to be approved by the Secretary of the Interior. The case involved a conflict between a selection by the state made April 22, 1868, and afterwards approved by the Secretary, and a settlement claim instituted one year and eight months after the selection but before the Secretary's approval. The court held that the land was open to both claims, to selection on behalf of the state and to settlement and pre-emption by settlers, but that a selection approved by the Secretary at a later day related back to its filing and cut out the claim under the settlement laws.

The case of *Osborn v. Froyseth*, 216 U. S. 571 [March 14, 1910], decides the question inferentially. In that case the railroad company had attempted a selection in 1883 which was rejected by the Secretary because not made in accordance with the rules of the department. In May, 1888, Froyseth settled upon the land intending to claim it as a homestead and ever since had continued in possession, residing thereon with his family. November 3, 1891, he made entry which was rejected for an invalid reason. October 29, 1891, the railroad company made a second selection and the first

controversy was between this selection and the homestead right of Froyseth initiated prior thereto. This was decided in favor of the homestead settlement on the ground that it was prior to the selection. It also was urged on the court that the railroad company had rights under the selection of 1883 and inferentially the opinion concedes that, if the 1883 selection was valid, rights under it would be carried back to that date, and disposed of the contention by holding that the 1883 selection was void. The point of decision is thus stated in the opinion, page 576:

> "The plain effect of the settlement made upon the land here in controversy before any valid selection of the same land by the railroad company, under its grant, was to initiate a homestead right. That settlement and possession continued from the time it was first made, and when, in October, 1891, the Hastings and Dakota Railroad, or its successors in title, attempted to select that land as indemnity land, the land in question was in the actual occupancy of Froyseth claiming it as a homestead."

The precise question here was decided in this court at a much earlier date. We refer to *Campbell v. Doe*, 13 Howard 244. That case came up from the Supreme Court of Ohio, where it was reported in 17 Ohio 267, and the controversy before coming into court had been waged before the Secretary of the Treasury, Roger Brooke Taney (whose powers then included control of public lands). The case involved an act of Congress passed on the 20th of May, 1826, which authorized selection by the Secretary of the Treasury of certain lands for school pur-

poses. The board of county commissioners of the County of Lawrence filed in the local land office in Ohio a request that the Secretary of the Treasury select certain lands for school purposes under this law. The Register transmitted the selection to the Commissioner of the General Land Office. Afterwards Robert Hamilton applied at the local land office in Ohio to enter the land and was informed of the selection and that on that account the land was withheld from sale. Thereupon Hamilton with the assent of the Register of the Land Office entered and paid for the quarter section and took a final receipt. The Secretary of the Treasury afterwards approved the request of the Commissioners of Lawrence County and selected the land for school purposes under the act of Congress. The case was submitted to the court upon an agreed statement of facts and under stipulation that should the court be of opinion that the entry by Hamilton was valid, notwithstanding the then pending unapproved selection, judgment should be entered for the defendants, otherwise for the plaintiff.

In this court Mr. Vinton, in support of the selection, argued:

> "The title thus vested in the State * * * reaches back to the date of the original selection of the land for schools, and the report of it, as such, to the Commissioner of the General Land Office. * * * The selection of the land * * * and the report of it, by the Register, to the General Land Office, by direction of the Secretary, for his decision thereon, being necessary and proper preliminary steps toward carrying the act into execution, had the effect in law to sever the lands thus selected and reported from the mass of the public lands until his decision was had; and, when ap-

> proved by him, the whole proceeding was in law one act, and constituted the selection by the Secretary required by the act."

The court said it was clear that the Secretary of the Treasury had power under the act of Congress to make the selection, notwithstanding the intervening entry of Hamilton, and affirmed the judgment of the Supreme Court of Ohio which had been in favor of the selection.

According to the foregoing decisions a selection duly filed and entered in the land office is not a nullity, and has the effect either: (a) to segregate the land and prevent other entries, (as would seem to be held in the Land Department decisions cited) or, (b) to attach to the land a claim which, by subsequent approval, may ripen into title as against a later claim, on the principle "prior in time first in right" (if the filing of later claims is permissible, which seems to be the view held in the decisions of this court cited). It is not necessary to press our argument farther than to affirm that, while the filing of a selection will not prevent the Secretary from receiving other applications and entries, still approval will give a good title as of date of the selection.

It is not necessary for us to maintain that a selection has a segregative effect to separate from the public domain, so as to prevent the filing of other applications. Land under unapproved selection may still be open to other entries *(Sjoli v. Dreschel* and cases cited above) but as to such conflicting applications this court repeatedly has applied the rule "prior in time first in right."

Consider the question on principle. A selection right "subject to the approval of the Secretary" to make good a specific grant of lands by Congress certainly is equal in validity and dignity to a general right of a class to select under a general land law. A right to enter or purchase public lands, under the homestead law or under the timber and stone law, is only a right to select. Lands are not reserved or appropriated by public land laws. Nor have applicants under those laws any contractual or vested right as against the government. By such laws Congress has given individuals of certain classes a right only to select, which is exactly what Congress also has given under laws making specific grants. All such rights, whether under general law or special law are of the same nature and are alike rights to select subject to approval of the Secretary. The Secretary in either case must pass on the same questions, that is (a) whether the applicant has shown himself entitled to select (b) whether the land chosen is free from appropriation and from prior claims (c) whether the proofs and proceedings are according to law and rules of the department. If these two rights are of the same nature and equal otherwise, it follows that the one prior in time will prevail. And so the land department and this court always has determined them.

When Jones, the grantor of Hoyt, went to the land office December 17, 1897 he found the selection entry of the railroad company there of record and ordered canceled only because it was east of Duluth. It had been so of record for over fifteen years unacted upon by the Secretary. Such delays are not uncommon. The duties of the Secretary are judicial. He must

determine in the first place whether there are deficiences in the grant giving the right to select, and in the second place whether the particular lands selected can properly be taken for those deficiencies, *Wisconsin Central Railroad Co. v. Price County*, 133 U. S. 496, 511. When Jones offered his proofs and money in December, 1898, the land was withdrawn to await the court's decision and he was most distinctly advised of the inception of a right in the railroad company, which might ripen into title by the Secretary's approval, and he chose with open eyes to buy into that contest. He is entitled to no equitable consideration and should stand on his legal right. *Campbell v. Doe, supra.* To Hoyt, Campbell and Wass the language clearly applies which was used by the court in *Gertgens v. O'Connor*, 191 U. S. 237, 246:

> "It is well to look further into his equities. It will be borne in mind that he did not go upon the land until April, 1891. The tract was within the indemnity limits of the company's grant, and was, therefore, subject to selection. It had been withdrawn from entry under the land laws, and that fact appeared on the records of the local land office. It had, in fact, been selected by the company, and that selection had not been cancelled. Ireland's contract of 1883 was of record in the office of the register of deeds of the county, and shown on the books of the company. The defendant applied for leave to enter the lands as a homestead, and was denied such leave by the local land officers on the ground that it was within the twenty-mile indemnity limits of the railway company's grant, and had been selected by the company. He was charged with knowledge of the act of Congress giving a preferential right of purchase from the government in case the company's title should

> in any way fail. Notwithstanding all this, he remained upon the land and put his improvements on it, and now claims to be entitled to the rights of a *bona fide settler*. He does not come within the letter of the statute, nor does he come within the reach of any reasonable equities. He evidently took his chances on the possibility of the company's failing to obtain title and a subsequent failure of Ireland to insist upon his preferential right of purchase. He went upon the land with full knowledge of all the facts, which showed that he had no right to enter, speculating upon possibilities which have not been realized, and having so speculated he cannot complain if he suffer the consequences which often attend the failure of a speculation."

To say, that by his application and payment under the circumstances, Jones acquired "*entire beneficial interest and equitable title*" and reduced the title of the United States to a "*naked legal title*," is not only to beg the question, but to contradict the well settled authorities in the land department and the decisions of this Court above cited.

Jones and his grantees cannot complain of the doctrine of relation being applied to them, and only by so applying it can justice be done. Certainly the right to select indemnity is clearly provided in the land grants and was intended to be a valuable right. Owing to the enormous areas comprised within those grants and the limited force in the department of the interior, it is customary that many years elapse before a selection can even be considered. The grantee entitled to select of necessity files in the land department a selection claim specifying particular land. That selection, like any other entry in the land department,

becomes a matter of record against that land. When the Secretary reaches consideration of the selection and approves it, equity, legal analogies, and the rules applied to all other entries at the land office require, that the approval and patent should be held to reach back to the inception of the claim. This doctrine is applied to all entries under the public land laws, and necessarily so, because time must elapse before they can be consummated, and in order to preserve the right in the interim approval and patent must relate back to the filing of the claim in the land office; or to put the matter in another way, what the Secretary was called upon to decide and what he did decide was that the selection was valid *when filed*.

The doctrine of relation has been defined as follows:

> "Where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred; and to this the other acts shall have relation." *DeForest v. Ramsey*, 3 Cow. 75, 80.
>
> "There is no rule better founded in law, reason, and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." *Landes v. Brant*, 10 How. 348, 373.
>
> "By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first

proceeding was had. Thus, in the present case, the patent, which was issued in 1862, is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the recorder of land titles under the act of Congress. At that time the title of the claimant to the land desired by him had its inception, and so far as it is necessary to protect his rights to the land, and the rights of parties deriving their interests from him, the patent is held to take effect by relation as of that date."

Gibson v. Chouteau, 13 Wall. 92, 100.

See, also,

United States v. Anderson, 194 U. S. 394;
Musser v. McRea, 44 Minn. 343.

In the recent case of *United States v. Detroit Lumber Co.*, 200 U. S. 321, 334, the court said:

"If it be contended that, by virtue of the contracts for the sale of timber, it had acquired some interest in the lands prior to the issue of patents, it is sufficient to say that by the doctrine of relation the patents, when issued, became operative as of the dates of the entries. It is true that this doctrine is but a fiction of law, but it is a fiction resorted to whenever justice requires. It is that principle by which an act done at one time is considered to have been done at some antecedent time. It is a doctrine of frequent application, designed to promote justice. Thus, a sheriff's deed takes effect not of its date, but of the time when the lien of the judgment attached. The ordinary railroad land grants have been grants *in praesenti*, and under them the title has been adjudged to pass, not at the completion of the road, but at the date of the grant. *Leavenworth, Lawrence & Galveston Railroad v. United States*,

92 U. S. 733; *St. Paul, etc., Railway Co. v. Phelps*, 137 U. S. 528; *St. Paul & Pacific v. Northern Pacific*, 139 U. S. 1; *United States v. Southern Pacific Railroad*, 146 U. S. 570. A patent from the United States operates to transfer the title, not merely from the date of the patent, but from the inception of the equitable right upon which it is based. *Shepley v. Cowan*, 91 U. S. 330. Indeed, this is generally true in case of the merging of an equitable right into a legal title. Although the patents in this case were not issued until after the sales of the timber, yet when issued they became operative as of the date of the original entries. This doctrine has frequently been recognized by this and other courts. *Landes v. Brant*, 10 How. 348; *Lessee of French and Wife v. Spencer*, 21 How. 228; *Stark v. Starrs*, 6 Wall. 402; *Lynch v. Bernal*, 9 Wall. 315; *Gibson v. Chouteau*, 13 Wall. 92; *Simmons v. Wagner*, 101 U. S. 260; *Jackson v. Ramsey*, 3 Cow. 75; *Welch v. Dutton*, 70 Ill. 465; *Ormiston, Guardian, v. Trumbo, Admr.*, 77 Mo. App. 310. In the first of these cases it was said (p. 372):

'To protect purchasers, the rule applies, "that where there are diverse acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred; and to this the other acts shall have relation," as stated in Viner's Abr. tit. Relation, 290. * * *

'Cruise on Real Property, vol. V., pp. 510, 511, lays down the doctrine with great distinctness. He says: "There is no rule better founded in law, reason and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation."'"

Should it be said that relation cannot cut out the rights of third persons, that again would be begging the question, for the very inquiry at issue is what rights

can be acquired by intervening applicants. Relation is never applied except to cut out intervening alleged rights. The assertion of such rights is necessary before the rule can come into play. It is a general principle that relation is enforced for the furtherance of justice, but is not applied to defeat intervening rights or equities of innocent third persons. But Jones and his grantees are not innocent third persons or purchasers in good faith without notice. Certainly one who applies to enter public lands, against which there is already a filing of record of which he is advised, is not a purchaser without notice. Jones had emphatic notice, but elected to enter a contest: there is no equitable reason why the principle of the decisions before cited, "prior in time first in right," should not apply to his case.

The whole contention to the contrary is based upon the language used in the opinion in *Sjoli v. Dreschel*, 199 U. S. 564. Having in mind the danger of applying general language to facts not involved in the case before the court, which Chief Justice Marshall, in *Cohens v. Virginia*, 6 Wheat. 264, 399, warned against, it is most important to note carefully the facts in the Sjoli case. These were, that Sjoli being a qualified homesteader settled upon the land in 1884 with the intention to make it a homestead. He grubbed and broke part of it, built a house and stable thereon and moved into the house with his family in October, 1884. He had lived with his family upon the premises continually ever since, had broken twenty-two acres and had constructed fences and other improvements of the value of five hundred dollars. He was in occupation of the land, claiming it as a homestead *before*

the railway company filed its selection. In 1889 he applied for patent and followed up his application so that in June, 1901, his entry *was approved and patent issued to him.* The other party to the suit, Dreschel, had no title except such as was conferred by a *selection disapproved by the Secretary.* In that case therefore the homesteader was first in time, and the Secretary had disapproved the subsequent selection on the very principles for which we contend. The approval of his application related back to his settlement to cut out the railroad selection. In this case on the contrary the selection was filed when the land was vacant and unappropriated, many years before the attempt to place of record a hostile claim and the entry was *subject* to the selection. Moreover, the Secretary approved the selection and issued the patent to the selector. There is nothing in *Sjoli v. Dreschel* holding that the Secretary *must* disapprove a selection merely because of a later entry, because the court takes pains to point out that the selection *had been disapproved* in the Sjoli case, and repeatedly alludes to the fact that Sjoli's settlement *was prior in time.*

Mr. Justice Harlan says, on page 566, that until selections are approved by the Secretary lands embraced in the selection lists are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws. This was a sufficiently accurate statement as applied to the facts of that case; but we submit, that the language could not have been intended to go entirely outside of those facts, to determine cases whose facts are essentially different and to overrule the settled decisions of this court and of the land department. It

is admitted, that until the selection is approved by the Secretary, land subject thereto is in the control and jurisdiction of the department, and that the selection confers no title upon the selector. This was held in *Humbird v. Avery*, 195 U. S. 480. It is admitted that land under an unapproved selection is subject to be disposed of by the United States. This is the result of many decisions. And the further statement that such land may be entered under the pre-emption and homestead laws may be admitted to its fullest extent so far as these cases are concerned.

But the question is, what is meant by saying that such land is subject to entry under the pre-emption and homestead laws? Simply we submit what was held in *Oregon & California Railroad Company v. United States, Shepley v. Cowan, McCreery v. Haskill, Campbell v. Doe*, before cited, namely, that entries may be filed which operate to create a contest and also to take the land providing the selection is *disapproved*. *La Bar v. Northern Pacific R. R. Co.*, 17 L. D. 406, was such a case. But there is no ruling in the Sjoli case that a selection is not the inception of a claim, or that it does not rank, if otherwise valid, ahead of subsequent entries, or that if approved the patent issued on it does not relate back according to the usual rule. We contend that it was never intended in the Sjoli case to decide more than, that subsequent filings might be made to be passed on by the Secretary in connection with the selection. This interpretation of the language brings the case into complete harmony with previous decisions of the court, and the construction contended for by opposing counsel makes the decision conflict with what was before decided. Mr.

Justice Moody, when attorney general, in opinion of June 19, 1906, placed the precise construction on this opinion which we contend for, and the Land Department has followed this opinion. Opinions of Attorneys General, vol. 25, p. 632.

Our contention is made more evident when we consider the statement of Mr. Justice Harlan in the opinion, that the propositions laid down in the Sjoli case are laid down in numerous decisions of the court (n. p. 566). For, whilst these decisions support our interpretation of the language of the court, not one of them supports the contrary interpretation. Several of them are cases where the whole ruling was that the Secretary had no right to make general withdrawals for indemnity under the Northern Pacific grant. That proposition is conceded for it has been decided several times. But there is no analogy between a general withdrawal of *unselected* lands to save indemnity for *possible* selections, and a retention by the Secretary of jurisdiction over distinct parcels *actually* selected to the extent necessary to pass on the selections. One is a case of withdrawing from settlement a whole region for protection of possible future selections, the other preserving specific parcels to satisfy present rights, actually asserted and attached.

To infer from the language of the opinion in the Sjoli case the proposition that an application to purchase under the land laws *ipso facto* annuls a prior selection and withdraws it from the consideration of the Secretary is contrary to the decision written by Mr. Justice Harlan in *Humbird v. Avery*, 195 U. S. 480. In that case it appeared that the railway company had filed certain selection lists (which included the

very selections here involved in the Hoyt and Campbell cases) and that entries under both the homestead and other laws had afterwards been made; that the land department had not acted upon either the selections or the entries. The suit was brought relying upon the unapproved selections, an important item of relief prayed being the restraint of threatened trespass by cutting timber. The Assistant Attorney General was allowed to intervene in the case, and pressed upon the court the proposition that lands in this status were still under the jurisdiction of the land department; that *it must act upon the selections and determine their regularity and validity before the matters complained of could be carried into court for adjudication.* This court sustained the argument and in substance sent the case to the department for it to decide as between the selections and the entries. It was not suggested by any counsel that the mere filing of an entry voided a prior selection, and had that been the view of the court the decision must have been that the railway company had no equity or standing before the department and the department no jurisdiction, except to pass upon the entries disregarding the selections.

If we are right in contending that the Secretary had jurisdiction to approve the selections, all three cases under discussion are thereby disposed of, in so far as concerns the questions on which they were decided below. The Campbell case was decided in our favor by the Circuit Court of Appeals on the ground of differences between that case and the Hoyt case—mainly upon the ground that Campbell had no entry in the land office whilst Hoyt's grantor had. The question whether the Campbell case was rightly decid-

ed below (assuming that the Hoyt case was also rightly decided) we submit upon the opinion of the Circuit Court of Appeals and upon the argument by counsel associated with us in the Campbell case. However, if the decision of the Campbell case below is sound, it ought, we submit, to control the Wass case, because Wass like Campbell never had an entry in the land office which could segregate the land from the public domain and thus avoid the selection; and Wass like Campbell was distinctly advised of the selection and elected to engage in a contest.

This leaves certain other questions raised by counsel in the Hoyt and Campbell suits to be considered.

2. It sufficiently disposes of all objections to the right of the Northern Pacific *Railway* Company as distinguished from the Northern Pacific *Railroad* Company, to say that Hoyt and Campbell cannot raise the question. If the Railway Company is not the successor of the Railroad Company the result is that the *Railroad* instead of the *Railway* Company is entitled to the land. Whilst this might give the Railroad Company the right to recover the title, it does not help either of these plaintiffs. They sue to charge the defendants as trustees of the legal title for *them*—and in the Campbell case it is prayed in addition that the land be restored to the public domain. But if the selections are otherwise good (and the Secretary has held them good) they cut out both Hoyt and Campbell, and it does not aid them to assert that the Railroad Company instead of the Railway Company should have had the land.

However, it may be well to point out that the *Railway* Company has purchased and succeeded to all the

rights of the *Railroad* Company. The proofs show that upon a bill filed by judgment creditors (not mortgage creditors) of the Northern Pacific Railroad Company, the Circuit Court, May 27, 1896, entered a decree of sequestration and appointed receivers (Transcript pp. 177-183). April 27, 1899, a final decree of sale was made, amended May 25, 1899 (Transcript pp. 145-156), ordering the sale to pay debts of all the lands in Minnesota, and rights to receive lands under grants from Congress or otherwise of the Northern Pacific Railroad Company. The Master's report of sale (Transcript pp. 156-177) was filed August 26, 1899, and a final decree confirming the sale was entered September 20, 1899 (Transcript pp. 184-187). The Master's report showed that the sale was made to the Northern Pacific Railway Company and it became a party to the final decree confirming the sale. The Circuit Court is therefore shown formally to have adjudicated in a proceeding properly before it the successorship of the Railway Company to the Railroad Company so far as the lands in suit are concerned. The plaintiff's allegation impeaches this decree.

The land having passed to the Railway Company in the manner shown, the question whether the mortgages executed by the Railroad Company and foreclosed against it in other proceedings in the Circuit Court (which mortgages did not cover the land in suit) were lawfully executed and properly foreclosed, is immaterial.

The proofs moreover show that in addition to the deed of the Special Master to the Railway Company and the deed of the receivers of the court to the Railway Company (Transcript pp. 189-197), the

Northern Pacific Railroad Company under the provisions of the decree executed and delivered a deed to the Railway Company, which conveyed all the lands and rights to land of the Railroad Company in the State of Minnesota. (Transcript pp. 197-201.)

And notwithstanding that the plaintiffs are in no position to raise the objection, we desire to show to the court that the Wisconsin act of 1895, printed as an exhibit to the bill (Transcript pp. 55-65), which authorizes the Superior & St. Croix Railroad Company, now Northern Pacific Railway Company, to purchase the railroad of the Northern Pacific Railroad Company (section 7 of which authorizes the company to purchase its land grant) was valid legislation. It was an act amending a private and local law of 1870, creating the Superior & St. Croix Railroad Company. November 7, 1871, an amendment to the constitution of Wisconsin was adopted, prohibiting certain special legislation. Among other kinds, legislation "for granting corporate powers or privileges, except to cities." In *Attorney General v. Railroad Companies*, 35 Wis. 425, and *Black River Improvement Company v. Holway*, 87 Wis. 584, it had been held, before the passage of the act of 1895 referred to, that the constitutional amendment did not impair the power of alteration and amendment by special act of charters passed prior to 1871. In *Attorney General v. Superior & St. Croix Railroad Company*, 93 Wis. 604, the Attorney General of Wisconsin unsuccessfully applied to the Supreme Court of the State for an information in the nature of *quo warranto* challenging the right of the Superior & St. Croix Company to exercise the franchises conferred by the amendatory act of 1895.

We refer the court to the opinion of the Secretary in this case citing opinions of Attorney General Harmon and Attorney General Moody holding the *Railway Company* to be lawful successor of the *Railroad Company*. (Transcript pp. 34, 35.)

3. The lands were not exempt from the Northern Pacific's selections because of the Lake Superior and Mississippi grant, or of anything done under it.

(a) There is nothing in the suggestion that the proviso in section 3 of the Northern Pacific act, which deducted from the grant to that company any lands theretofore granted by the United States to another railroad "as far as the routes are upon the same general line," operated to *deduct* from the lands granted to the Northern Pacific the lands within the conflicting limits of its grant and that of the Lake Superior and Mississippi Company. This for the good and sufficient reason that the two grants are not upon the same general route. One grant extended from St. Paul to the head of Lake Superior, approximately and substantially north and south. The other grant extended from Lake Superior to Puget Sound, approximately and substantially east and west. Whilst the two grants did not cross each other at perfect right angles, they did so approximately, as shown by the diagram printed opposite page 43, transcript. *Doherty v. Northern Pacific Ry. Co.* 177 U. S. 421; *United States v. Northern Pacific Railroad Co.*, 177 U. S. 435.

(b) It therefore follows that the lands used as a basis of loss for the selection in question were within the place limits of the Northern Pacific grant. They were not within the place limits of the Lake Superior and Mississippi grant, but only within its limits of

indemnity. Nor were they within the order of withdrawal of May 26, 1864, made under that grant (which distinguishes this case from *Northern Lumber Company v. O'Brien*, 204 U. S. 190, and *Northern Pacific Railroad Company v. Musser-Sauntry L. L. & Mfg. Co.*, 168 U. S. 604.) It is true that the base land was conveyed by the United States under the grant of May 5, 1864. But it *did not pass by that grant*. It passed because it fell within its indemnity limits, and was selected as indemnity *after the date of the Northern Pacific grant and prior to the definite location of that road*. Being lost therefore to the Northern Pacific grant, not before its passage, but after, it clearly formed the basis for a second indemnity selection (see opinion of Secretary, Transcript pp. 35, 36).

4. A good and sufficient answer to all criticisms upon the form or regularity of the selection list is, that the selections were by the terms of the act to be made subject to the approval of the Secretary of the Interior, and he has approved them.

But it may be suggested as a limitation upon the right of selection (a) that the selection must be made on the side of the railroad where the loss occurred.

From the beginning no such limitation under the Northern Pacific grant has ever been suggested by any Commissioner of the General Land Office or by any Secretary of the Interior. That the land department rules the other way and holds that selections under the Northern Pacific act are not thus limited is sufficiently indicated in its decisions set forth as exhibits in the record.

Neither is the limitation warranted by the language of the indemnity clause in question, which is:

> "And whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted ,or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.'"

No qualification being imposed by Congress as to the side of the road upon which selection may be made, no such qualification can be inserted in the act by judicial legislation.

Counsel refers to the case of *United States v. Burlington and Missouri River Railroad Company*, 4 Dillon 297, affirmed 98 U. S. 334, as establishing that under the Northern Pacific grant selections of indemnity are confined to that side of the railroad on which the loss occurs. But an examination of those decisions shows that they are based on a peculiarity of the grant there considered. That grant did not provide indemnity and the decisions cited did not relate to indemnity but to *granted* lands. Section 19 of the Burlington and Missouri act, considered in the decisions cited, grants to that company every alternate section (except those reserved) designated by odd numbers *to the amount of ten sections per mile on each side of said road*. The opinion of Mr. Justice Miller was that this language conferred no right to take more on either side of the road than what amounted to ten sections per mile on that side, and that, if for any reason the required num-

ber of sections could not be found on one side, it was a loss for which indemnity was not provided in the act; that there existed therefore no power in the land department to issue patents for lands lying on the north side in lieu of lands deficient on the south side. This court said as to this that the grant contemplated one-half of the land to be taken on each side of the road and that the department could not enlarge the quantity on one side to make up the deficiency on the other. This case has therefore no bearing upon the question at issue.

The case of *Southern Pacific Railroad Company v. Smith*, 74 Fed. Rep. 588, seems to be like this and we submit that it was decided erroneously. It is contrary to the plain language of the act, as we have shown, and contrary to the unvarying ruling of the land department. We are advised moreover that the Circuit Court granted a rehearing in that case and ordered defendants to show cause why the decision should not be reversed; that no ruling was ever made upon this order to show cause because the case ceased to be important, the lands having been ascertained to fall within the conflicting grant of the Atlantic and Pacific Company.

(b) There is nothing in the suggestion, should it be made, that no selections can be made from the second indemnity limits until it is shown that the lands within the first indemnity limits along the entire line from Lake Superior to Puget Sound are exhausted.

Such a contention is flatly contradictory of the terms of the joint resolution of 1870, establishing the second indemnity limits. If the first three lines of that resolution had been framed with the specific intention to

make such an assertion impossible they could not have been more efficiently worded. The resolution means precisely what it says, that the right to second indemnity lands shall arise whenever, at the time of final location of the road, there is not *in any state or territory*, within the limits prescribed by the original charter, the amount of lands per mile granted to the company by Congress. The material part of the joint resolution reads as follows:

> "And in the event of there not being in any state or territory in which said main line or branch line may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road beyond the limtis prescribed in said charter, as will make up such deficiency on said main line or branch except mineral and other lands, as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, subsequent to the passage of the act of July two, eighteen hundred and sixty-four."

That the first indemnity limits in Minnesota were deficient to furnish selections to make the losses good involved in the Hoyt and Campbell cases was necessarily adjudicated by the Secretary when he approved the selections and issued the patents. Upon settled rules we can say that his decision of this question of fact is conclusive.

5. It may be urged in the Hoyt case that the act of Congress of July 1, 1898 (30 Stat. 620), operates to give the plaintiff Hoyt the land in his suit and to compel the Railway Company to select elsewhere. Notwithstanding the statement of the Circuit Court of Appeals in the Campbell case, it seems clear that this question cannot be raised in that case; nor do we understand that Campbell's counsel so contends. Campbell, having no entry of record against the land, falls clearly outside the law in question and the act need only be considered with reference to the case of Hoyt.

The material provisions of the act are:

> "That where, *prior to January first, eighteen hundred and ninety-eight*, the whole or any part of an odd-numbered section, in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been *purchased* directly from the United States *or settled upon* or *claimed in good faith by any qualified settler* under color of title or claim of right under any law of the United States or any ruling of the interior department, and where purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, or not occupied by settlers at the time of such selection, situated within any State or Territory into which such railroad grant extends, and patent shall issue for the land so selected as though it had been originally grant-

ed: but all selections of unsurveyed lands shall be of odd-numbered sections, to be identified by the survey when made, and patent therefor shall issue to and in the name of the corporation surrendering the lands before mentioned, and such patents shall not issue until after the survey: *Provided however,* That the Secretary of the Interior shall from time to time ascertain and, as soon as conveniently may be done, cause to be prepared and delivered to the said railroad grantee or its successor in interest a list or lists of the several tracts which have been *purchased or settled upon or occupied as aforesaid, and are now claimed by said purchasers or occupants,* their heirs or assigns, according to the smallest government subdivisions. And all right, title, and interest of the said railroad grantee or its successor in interest in and to any of such tracts, which the said railroad grantee or its successor in interest may relinquish hereunder shall revert to the United States, and such tracts shall be treated, under the laws thereof, in the same manner as if no rights thereto had ever vested in the said railroad grantee, and all qualified persons who *have occupied and may be on said lands* as herein provided, *or who have purchased said lands in good faith as aforesaid,* their heirs and assigns, shall be permitted to prove their titles to said lands according to law, as if said grant had never been made; and upon such relinquishment said Northern Pacific Railroad Company or its lawful successor in interest may proceed to select, in the manner hereinbefore provided, lands in lieu of those relinquished, and patents shall issue therefor: *Provided further,* That the railroad grantee or its successor in interest shall accept the said list or lists so to be made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but it shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable

for stone, iron, or coal; *And provided further*, That whenever any qualified settler shall in good faith make settlement in pursuance of existing law upon any odd-numbered sections of unsurveyed public lands within the said railroad grant to which the right of such railroad grantee or its successor in interest has attached, then upon proof thereof satisfactory to the Secretary of the Interior, and a due relinquishment of the prior railroad right, other lands may be selected in lieu thereof by said railroad grantee or its successor in interest, as hereinbefore provided, and patents shall issue therefor: *And provided further*, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this Act, and nothing in this Act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted: *And provided further, That all qualified settlers*, their heirs or assigns, who, prior to January first, eighteen hundred and ninety-eight, *purchased or settled upon or claimed in good faith*, under color of title or claim of right under any law of the United States or any ruling of the Interior Department, any part of an odd-numbered section in either the granted or indemnity limits of the land grant to the Northern Pacific Railroad Company to which the right of such grantee or its lawful successor is claimed to

have attached by definite location or selection, may in lieu thereof transfer their claims to an equal quantity of public lands surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, or not occupied by a settler at the time of such entry, situated in any State or Territory into which such railroad grant extends, and make proof therefor as in other cases provided; and in making such proof, credit shall be given for the period of their *bona fide* residence and amount of their improvements upon their respective claims in the said granted or indemnity limits of the land grant to the said Northern Pacific Railroad Company the same as if made upon the tract to which the transfer is made; and before the Secretary of the Interior shall cause to be prepared and delivered to said railroad grantee or its successor in interest any list or lists of the several tracts which have been purchased or settled upon or occupied as hereinbefore provided, he shall notify the purchaser, settler, or claimant, his heirs or assigns, claiming against said railroad company, of his right to transfer his entry or claim, as herein provided, and shall give him or them option to take lieu lands for those claimed by him or them or hold his claim and allow the said railroad company to do so under the terms of this Act."

The purpose of the act is obvious—to furnish a means of adjustment of controversies between the Northern Pacific and the settlers within its grant. The cry for its passage came from homesteaders and preemptors who had gone onto lands under various rulings of the department, which had been overruled in the courts, or were there being challenged. The settler in danger of being dispossessed was alone in the mind of Congress. The government has ever been

tender of settlers upon the public lands, and the law would never have been passed to protect the timber or stone speculator.

The purpose of the law was to protect those who would be subjected to real loss and hardship if the claim of title of the railroad company should be sustained. Settlers under the homestead law, or under any other settlement law, would fall in that category. Not only would their improvements be lost, but their time of residence could not be credited to them upon entry of other lands. This was felt to be a real hardship. But a cash purchaser under the timber and stone law could by the failure of his purchase suffer no loss, except a loss of expected profits. His money would be repaid by the government. And so far as a mere applicant to purchase is concerned, he could suffer no loss of any sort. The equities of such purchasers and applicants under the timber and stone law could never have moved Congress to pass the act of 1898, and should not now move the land department and courts to any special effort to extend the act so as to include them.

The language of the act requires, first, that the right of the settler should have attached "prior to January first, eighteen hundred and ninety-eight," thus excluding conflicts created after that date. It is restricted carefully to lands, prior to the date named, "purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right," etc. The last proviso allows "settlers, their heirs or assigns," to transfer their claims to other lands "not valuable for stone, iron or coal."

This statute should be construed not only with due regard to all the language therein contained, but in connection with prior similar legislation, namely, the acts of 1874 and 1890, which were acts for the relief of settlers only. The first clause of the act of 1898 may be read in two ways, depending on whether the words, "by any qualified settler," relate to and qualify the entire preceding clause, "has been purchased directly from the United States or settled upon or claimed in good faith," or whether they relate to and qualify only the words, "settled upon or claimed." The former interpretation is by far the more reasonable. The word "purchase" is used with reference to a purchase by a settler, and the distinction drawn between lands purchased and lands settled upon or claimed, was simply to make it clear that the act was intended to apply equally, whether the settler's rights had been consummated by purchase, or only initiated by settlement or claim.

Any doubt upon this subject seems to be put at rest by the subsequent provisions of the act. The last proviso clearly applies only to qualified settlers who purchased or settled in good faith. This clause is as free from ambiguity as language can be, and should settle whatever doubt arises from the loose construction of the first clause.

This interpretation is much strengthened by the fact that the timber and stone act is limited to lands valuable for timber or stone and unfit for cultivation. The act of 1898, in permitting the transfer of settlers' claims, provides that lands valuable for stone shall not be so taken. This proviso is manifestly inconsistent

with the view that the act was intended to cover timber and stone entries.

If our construction is not correct, the result is that the act of 1898, by being extended to lands acquired under the timber and stone law, is in direct conflict with the settled policy of land legislation. Such a construction permits a cash purchaser under the timber and stone law to take in lieu thereof agricultural lands without any settlement. The policy of disposing of agricultural lands for cash without residence and qualification was terminated by the repeal of the pre-emption law in 1891.

It should not be supposed by the court that the eastern terminal controversy played the slightest part in the passage of the act of 1898. It is demonstrable that that act was in fact passed for the relief of settlers, and without any reference to that controversy. There were substantially no controversies in the country involved in the eastern terminal question when the act of 1898 was passed. The decision of the supreme court of Wisconsin, which was the first concerning the eastern terminus, was made June 23, 1898, and the provision of the sundry civil bill under discussion was introduced as an amendment by Senator Wilson, of Washington, in March, 1898. All the lands of the Northern Pacific Railroad Company in Minnesota were at that time in the hands of receivers. The act was passed to assist settlers in the state of Washington, and some other settlers upon agricultural lands, whose settlements were jeopardized by the decision in *McHenry v. Nygaard*, 72 Minn. 2, decided April 22, 1898.

However, it is not necessary to determine whether *purchasers* under the timber and stone law are in-

cluded in the act of 1898. It is sufficient for this case to point out that Jones, under whom Hoyt claims title, had only filed an application for the land before the first of January, 1898, and paid his money and filed proofs December 10, 1898, with full notice of the railway company's rights, and under a receipt subordinating his entry to those rights. No vested right and no inchoate right had been acquired by Jones before the date fixed by the act of 1898. His application initiated no right as against the government, and prior to his final proof and payment the Secretary might suspend the land from sale and disposition under the public land laws. This is precisely what was done in this case. The tract was withdrawn from entry by the order of February 28, 1898, and the payment of Jones was allowed under a receipt expressly stipulating that such payment was subject to any claim of the railway company. The decisions of the department in the case of Jones, attached to the bill of complaint as exhibit "B" (Transcript pp. 33-41), and in the case of *Eaton v. Northern Pacific Ry. Co.*, 33 L. D. 426, leave little to be said.

It is hardly necessary to refer to the numerous decisions of this court in which it has been held, that where a statute is of doubtful meaning the settled interpretation of the land department will be followed by the court. *Hewitt v. Schultz,* 180 U. S. 139.

6. In conclusion, let us remind the court that the defendants have purchased in good faith from the patentee of the United States. The patent is not one issued inadvertently, and no suggestion is made of any fraud in obtaining it. Every fact and every question of law preliminary to its issue were fully argued

upon both sides, and carefully considered by the Commissioner of the general land office, and by the Secretary of the Interior. Both of those officers have decided every question in the case against the entrymen. The rule in such cases is well settled by a long line of decisions that the department's decision is conclusive as to the facts and cogent as to the law. It can only be overruled for a mistake of law, and the mistake must be clear. *Smelting Company v. Kemp,* 104 U. S. 636, 646; *Maxwell Land-Grant Case,* 121 U. S. 325, 379; *Barden v. Northern Pacific Railroad Co.,* 154 U. S. 288, 325-331.

CHARLES W. BUNN.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1909.

No. 397.

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, APPELLANT IN THE SUPREME COURT OF THE STATE OF MINNESOTA, AND PLAINTIFF IN THE DISTRICT COURT OF TODD COUNTY IN SAID STATE.

vs.

FRED WASS AND PAULINE WASS, HIS WIFE, DEFENDANTS IN ERROR, RESPONDENTS IN THE SUPREME COURT OF THE STATE OF MINNESOTA AND DEFENDANTS IN THE DISTRICT COURT OF TODD COUNTY IN SAID STATE OF MINNESOTA.

WRIT OF ERROR FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

MOTION FOR ADVANCEMENT ON DOCKET.

Now comes Fred Wass and Pauline Wass, his wife, by their solicitor, P. B. Gorman, and moves the court that the above entitled cause be advanced upon the Docket of this court to such date and time as may to the court seem most convenient that the same may be speedily heard and determined.

Statement of Matter Involved.

I.

Plaintiff in Error, Appellant in the State Supreme Court, and Plaintiff in the court below, alleges in its complaint that it is a corporation duly organized and existing under the laws of the State of Wisconsin, that it is the owner of and entitled to the immediate possession of the following described land, towit: the south east quarter of section thirteen (13) township one hundred and twenty-nine (129) north of range thirty-two (32) west of the fifth principal meridian, situate in Todd County, Minnesota, and containing one hundred sixty (160) acres more or less according to the government survey thereof, and that this action in ejectment is brought to recover possession thereof.

II.

The record in the case shows that plaintiff in error claims to be the owner of said described land under the indemnity provision of a land grant made to the Territory and subsequent State of Minnesota by acts of Congress approved March 3, 1857; March 3, 1865; and March 3, 1871, to aid in the construction of railroads in said state, and it appears also in the record that the railway company's application to select the same, as lieu land, was approved by the Secretary of the Interior February 12, 1905, and that patent therefor was on March 15, 1905, issued to the State of Minnesota for the benefit of the railway company entitled thereto.

III.

In its Complaint herein, plaintiff in Error prays judgment against defendants.

(1) for the recovery of the above described land.

(2) for the sum of one hundred ($100.00) dollars per year as rents, issues, and profits from June 2, 1905, to the date when said premises shall be restored to the possession of plaintiff,

(3) and for its costs and disbursements herein.

IV.

Fred Wass, one of the defendants in Error, one of the respondents in the State Supreme Court, and one of the defendants in the court below, alleges in his answer that he is the equitable owner of the land above described, and that he is entitled to possession of the same under the provisions of the homestead laws of the United States, by reason of his settlement upon and his application to enter the same, as a homesteader, under the public land laws in the year 1899, as more specifically set forth in defendant's answer herein, and by reason of his improvements made from year to year and his continuous residence thereon from the month of April, 1899, to the present time, and for more than five years prior to the date, February 12, 1905, on which said described land was approved to the railway company as lieu land, by the Secretary of the Interior.

V.

In his answer, defendant in error, Fred Wass prays judgment against plaintiff in Error:

(1) That plaintiff's prayer be refused, rejected, overruled, and denied,

(2) That the Northern Pacific Railway Company may be declared and held trustee of the legal title of said lands for defendant, Fred Wass' use and benefit,

(3) That the said Northern Pacific Railway Company be required by order and decree of this court, to convey the legal title of said described land to defendant, Fred Wass, for his own use and benefit by good and sufficient deeds of conveyance and

(4) That defendants have judgment for their costs and disbursements herein.

VI.

In the district court in the aforesaid county and state, plaintiff demurred to defendants answer, in the above entitled cause, thereby admitting the allegations and statements in the said answer contained.

After argument heard for and against said demurrer, the same was overruled by the court, and, on appeal, the order overruling said demurrer was upheld, and in all things affirmed, by the Supreme Court of the State of Minnesota.

VII.

In accordance with the judgment and mandate of said Supreme Court of the State of Minnesota, judgment was entered in the office of the clerk of the said District Court of Todd County, Minnesota, in accordance with the prayer of defendant's answer, in favor of the defendant, Fred Wass, and against plaintiff.

VIII.

An appeal was taken from the judgment entered as aforesaid in defendants' favor, to the Supreme Court, which adhered to and reaffirmed its former decision in the case. From this latter decision of the State Supreme Court the case comes here on Writ of Error.

IX.

The reasons and grounds for the application are:

(1) The case at bar has been in controversy between defendant in Error, and the railway company in interest, for ten years, or since the summer of 1899, as follows: first in the local land office at St. Cloud, Minn., later in the general land office in Washington, again in the Interior Department, also in the district court of Todd County, in the State Supreme Court of Minnesota, and finally, now since March, 1909, pending in this court.

(2) Defendant's means are exhausted by reason of the costs and expense incident to the long course of litigation, extending as above stated through so many years..

(3) Defendant's credit also, is impaired by reason of the rejection, by the United States Land Department, of his claim for the land in suit, and the issue of patent therefor to the Northern Pacific Railway company under the indemnity provisions of its land grant.

(4) Owing to his want of means and of credit, it will be very difficult for defendant, Wass, to hold out and remain in possession of his said claim unless his case be taken up out of order and argued at such early day as may be convenient for the court.

(5) *Affidavit of Defendant in Error, Fred Wass.*

(Original on file in the office of clerk of this court.)

IN SUPREME COURT OF THE UNITED STATES.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

FRED WASS AND PAULINE WASS, HIS WIFE,
Defendants in Error.

Involving title to the Southeast quarter of Section number thirteen (13), Township one hundred twenty-nine (129), north of range thirty-two (32), west of the fifth Principal Meridian.

STATE OF MINNESOTA, COUNTY OF TODD.

Fred Wass being first duly sworn doth depose and say that he is defendant in the above entitled case, that he is the homestead claimant, who has resided upon, improved and cultivated the above described land for the ten years last past, and who applied to enter the same as a homestead in the year 1899, that the title to the above described land has been in controversy between himself and the railway company for the last ten years as follows: First, in the local land office in St. Cloud, Minn., later in the general land office at Washington, again in the Interior Department, also in the district court of Todd County, in the Supreme Court of Minnesota, and finally, now, since March, 1909, pending in this court, that the land in question is valuable for farming purposes only, and is worth, at the present time not to exceed four thousand ($4,000) dollars at the outside, that this affiant has no other property, whatsoever, except his interest in this land, his farm implements, his team of horses and a few head of other live stock, that by reason of the costs and expenses thus far necessarily incurred, in the contest with the railway company his means, slender at the beginning and always small, are exhausted, that by reason of the rejection of his claim by the United States Land Department, and the granting of a patent for same to the railway company his credit is seriously impaired and to such a degree that it is nearly or quite impossible for

him to continue the contest against the said railway company unless the case be argued and determined at such early day as may be convenient for the court

(Signed) FRED WASS.

Subscribed and sworn to before me a notary public in and for the County of Morrison, and State of Minnesota, this 19th day of July, 1909.

(Signed) CHARLES E. STITH.

(SEAL)

Notary Public, Morrison County, Minn.

My Commission Expires Feb'y. 13, 1913.

STATE OF MINNESOTA, COUNTY OF TODD.—ss.

(6) William Seims and James W. Cofield being first duly sworn, each for himself doth depose and say that he has read the foregoing affidavit and knows the contents thereof, and that the same is true of his own knowledge except those things that he has on information and belief and as to those things he believes it to be true, and further deponents saith not except that they have each known Fred Wass and the land in question for at least ten years, and that this statement is made to corroborate the foregoing affidavit of Fred Wass.

(Signed) WILLIAM SEIMS,

JAMES W. COFIELD.

Subscribed and sworn to this 19th day of July, 1909, before me a notary public in and for the said County of Morrison and State of Minnesota.

(Signed) CHARLES E. STITH.

(SEAL)

Notary Public, Morrison County, Minnesota.

My Commission Expires Feb'y. 13, 1913.

(7) The long delay already suffered in this case, the want of further means and of further credit, on the part of defendant in Error to continue the controversy to the end in its regular order, together with the difficulty of remaining in possession of the land under present conditions are such special and peculiar circumstances as may be deemed sufficient cause for taking up the case out of order and advancing the same on the docket under sub-division number seven (7) or rule twenty-six (26) of the Rules of this Court.

(8) There are several other cases, perhaps more than an hundred, in the counties of Morrison and Todd, in the State of Minnesota, involving the same question and the same issue, presented for the consideration of the Court in this case, in each and all of which the lands have been in controversy between the settlers and the railway company for several years last past, and these and other homestead claimants are in doubt and in great perplexity as to what is best for them to do, until a decision in this case is announced by the Court. There are many similar cases, involving the same question, in other parts of the State of Minnesota, and in other Northwestern states, so that an early decision in this case would be of great benefit to a large number of people in the Northwestern states.

(9) Should the Court find the grounds above assigned not sufficient to advance the case under subdivision seven (7) of the said rule, then and in that case we beg leave to have the case advanced on the docket under sub-division eight (8) of the rule above cited, upon the ground, and for the reason that the only question at issue in the case at bar, to-wit: is land in odd numbered sections lying within the indemnity limits of a rail-

road land grant, in the State of Minnesota, subject to entry under the public land laws of the United States, while an application, by the railway company, to select the same, as lieu land, is pending before the Secretary of the Interior and before the said Secretary has approved the same to the railway, is likewise the only question involved in the case of Weyerhauser et al, vs. Hoyt, docket number 195, Oct. Term, 1909, now pending in this court.

(10) Messrs. Weyerhauser, et al, in that case and the Northern Pacific Railway Company in the case at bar, each, and both, contend that the aforesaid question should be answered in the negative, while Mr. Hoyt in his case and Mr. Wass in the case at bar, ask the court to answer the said question in the affirmative.

(11) The general solicitor of the Northern Pacific Railway Company, Charles W. Bunn Esq., appears as counsel and attorney of record in each of these two cases, in the case at bar, he appears for the Northern Pacific Railway Company and in the other case he appears for Messrs. Weyerhauser et al, both of which parties are asking that the question involved be answered in the negative, and he could cover the question at issue in each and in both of them in one and the same oral argument.

(12) The other side of the said question, which both Mr. Hoyt and Mr. Wass ask to be answered in the affirmative could be argued by the attorneys of record in the respective cases, without unnecessary repetition under the direction of the Court.

(13) Mr. Fred Wass, defendant in error, in the case at bar, would prefer to have his case advanced for argu-

ment under sub-division seven (7) of the aforesaid rule, as, *under present conditions,* a delay until the Messrs. Weyerhauser et al, is reached in order will be embarrassing to Mr. Wass, who, therefore respectfully asks that argument may be heard in his case at the earliest day convenient for the court.

(14) Should request in foregoing paragraph not be granted then, we will be pleased to avail ourselves of the privilege, if allowed, to take up the case under sub-division eight (8) of the said rule at the same time that the case of Weyerhauser et. al, vs. Hoyt is being argued.

Respectfully submitted,

P. B. GORMAN.

Solicitor for Defendants in Error, St. Cloud, Minn.

IN UNITED STATES SUPREME COURT.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

FRED WASS AND PAULINE WASS, HIS WIFE,
Defendants in Error.

NOTICE OF MOTION.

Sir:—

Please take notice that a motion, a copy of which is set forth in the foregoing pages and herewith served upon you, will be made in the Supreme Court of the United States on Monday, the 18th day of October, 1909, at 12 o'clock m., of that day, or as soon thereafter as counsel can be heard, to advance the above entitled case on the docket of said court so that argument may be heard in said case at such early day as may be convenient for the court.

Dated at St. Cloud, Minn., August 9, 1909.

P. B. GORMAN.

Solicitor for Defendants in Error, St. Cloud, Minn.

To Charles W. Bunn Esq.,

Solicitor for Plaintiff in Error, St. Paul, Minn.

Due service of the foregoing notice is hereby admitted this 10 day of August, 1909.

(Signed) Charles W. Bunn

Solicitor for Plaintiff in Error, St. Paul, Minn.

Office Supreme Court, U. S.
FILED
FEB 28 1910
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1909

No. [redacted] 181.

NORTHERN PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

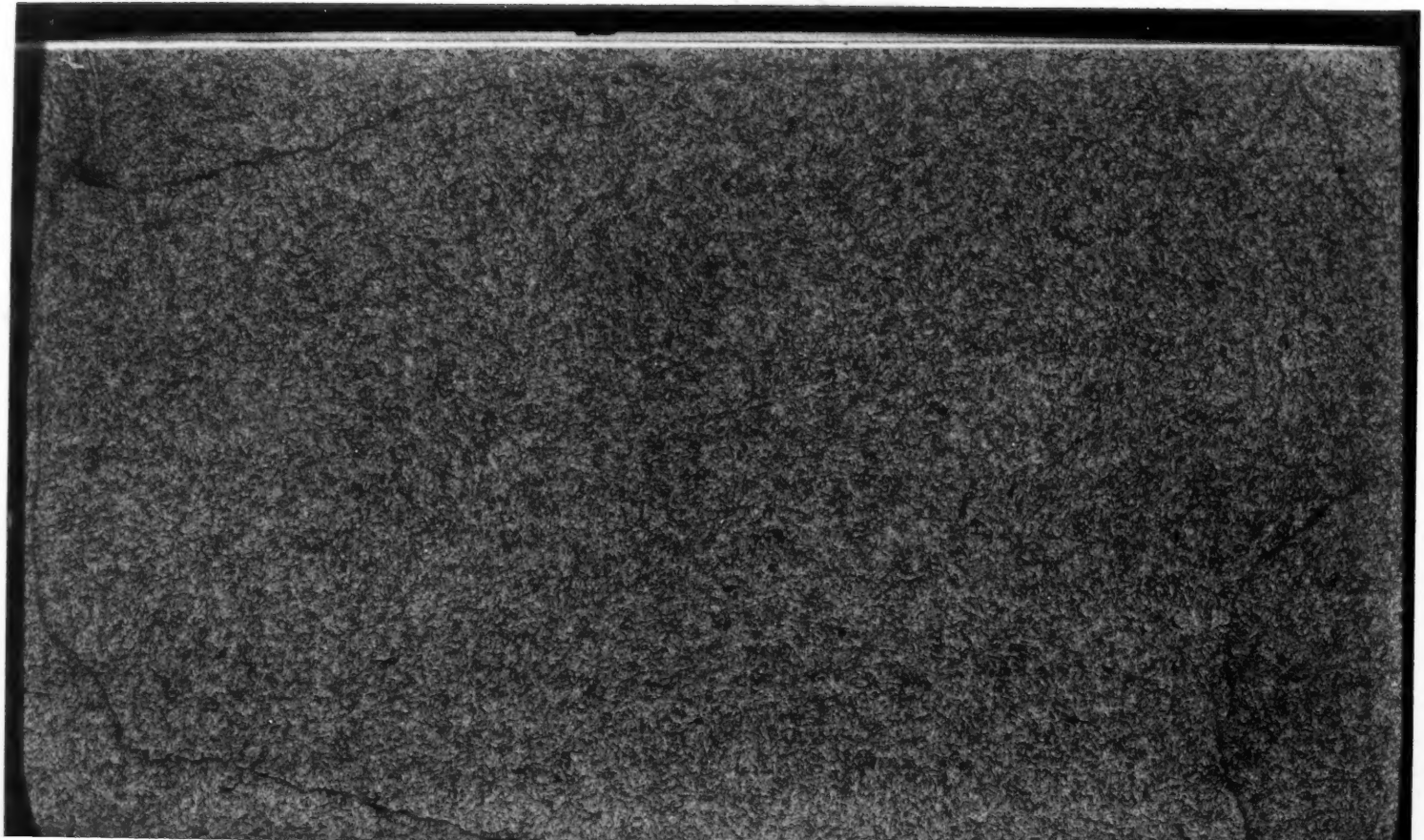
vs.

FRED WASS and PAULINE WASS,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

P. B. GORMAN,
SOLICITOR FOR DEFENDANTS IN ERROR,
ST. CLOUD, MINN.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1909

NORTHERN PACIFIC RAILWAY COMPANY,

Plaintiff in Error.

vs.

FRED WASS AND PAULINE WASS, His Wife,

Defendants in Error.

STATEMENT.

The land, here in controversy, lies within the indemnity limits of the land grant made to the Territory of Minnesota by act of Congress approved March 3, 1857, and also within the indemnity limits of the grant made to the State of Minnesota by the act of Congress approved March 3, 1865, and is described as follows: The southeast quarter (SE$\frac{1}{4}$) of section thirteen (13), township one hundred twenty-nine (129), north of range thirty-two (32) west of the fifth principal Meridian and situate in Todd County, Minn.

Twenty years after the passage of the act of Congress making this land grant, and after unsuccessful attempts to secure the building of that part of one of its branch lines of railroad, lying between Watab and Crow Wing, the said State of Minnesota, by an act of its legislature, approved March 1, 1877, conferred all its interest and right in and to the aforesaid land grant, upon the Western Railroad Company of Minnesota, which company proceeded to build, and did build, equip, and operate a line of railroad between the points above mentioned, and, in the fall of 1877, said company filed, in the General Land office a list of applications to select indemnity land, which list embraced the tract here in controversy.

Subsequently and after the building of the line of road from Watab to Crow Wing in said state, the said Western Railroad Company of Minnesota was reorganized under the name of St. Paul and Northern Pacific Railway Company.

And thereafter by means of legal proceedings the Northern Pacific Railway Company came into possession of the land grant, here involved, and thus became the legal successor of the Western Railroad Company of Minnesota.

As stated above the Western Railroad Company of Minnesota applied to select the tract above described, as indemnity land, in the fall of 1877, but failed and neglected, at that time or at any time, to designate a loss, in its primary limits, as a basis for the purposed selection. Twelve years

later, and in 1889, the same company under its new name, St. Paul and Northern Pacific Railway Company, again applied to select this tract as indemnity, but, as in the former application, failed and neglected to specifiy a basis for the purposed selection. February 1892 the company applied, a third time, to select this tract as lieu land and designated, for the first time, a basis for the selection.

Neither of the above mentioned three applications was approved by the secretary of the Interior, as required by law, or otherwise, and each and all of said applications, were invalid and without force or effect, at the time Fred Wass settled upon said land in April 1899, with the bona fide intention of entering it under the homestead law, and at the time he presented his homestead application, therefor, to the Register and Receiver of the district, wherein the land was located, in the fall of 1899.

In the spring of 1899, Defendant in error, Fred Wass, went upon the land, built a house and moved his family into it, and has remained in possession and occupancy continuously up to the present time, and he is living there now. The same summer he built a stable, dug a well, and made such other and further improvements upon the place, as were found to be necessary and convenient for a poor family just starting out on a homestead. He has added to his improvements, each year, in the way of grubbing, clearing and breaking until,

at the beginning of this suit, his improvements were worth and of a value in excess of twelve hundred dollars.

In December, 1899, Mr. Wass made application at the local land office in St. Cloud, to enter the land under the provissions of the homestead law. His application was rejected, by the local officers, and his money, tendered as fees and commissions, was refused upon the ground, that the land applied for was embraced in a then pending though unapproved indemnity selection theretofore, applied for by the St. Paul and Northern Pacific Railway Company.

Mr. Wass appealed from the ruling of the local officers and their action was approved and affirmed by the Commissioners of the General Land Office, and by the Secretary of the Interior, respectively.

In February, 1905, the Secretary of the Interior approved the application of the company to select this land, and, on the 15th day of March of the same year, a patent therefore was issued by the United States, to the State of Minnesota for the benefit of the railway company entitled thereto, and thereafter, the patent of the State of Minnesota for said land, was issued to, and in favor of, the Northern Pacific Railway Company, Plaintiff in error herein.

Wass and his family were in possession of and occupying the place as a home, at the time the patent was issued to the railway company by the State of Minnesota. The company brought an ac-

tion in ejectment against Wass and his wife to oust them from possession. The case was tried in the district court of Todd County, before the court, without a jury, and judgment rendered as shows in the record (page 10 to 13) in favor of Defendants Wass and wife.

On appeal the decision of the trial court was affirmed by the supreme court of Minnesota (record page 22 to 29) and the questions involved are brought here from that court on a writ of error.

QUESTIONS INVOLVED.

The only question involved in this case is, are lands in odd numbered sections within the indemnity limits of a railroad land grant, open to occupancy and entry under the homestead law, while the railway company's application to select them, as lieu land, is pending before the Secretary of the Interior. Or, putting it in another form, can lands in the indemnity limits of a railroad land grant, be designated selected before the company's application for same is approved by the said Secretary?

ARGUMENT.

Defendants in error contend that the decision of the supreme court of Minnesota, in the case at bar, should be upheld and affirmed in all respects, upon the ground and for the reasons:

1. This court has jurisdiction of the case.

2. The railway company's application to select the land, here in suit, did not segregate it from the public domain, or reserve it from entry under the homestead law.

3. The common law Fiction of relation cannot be applied to this case, so as to divest the interest and right of a homestead claimant who is living upon the land and has applied to enter it as a homestead before the Secretary of the Interior has approved the company's application.

4. The rights and interest of Fred Wass, as a homestead claimant, were not affected by the refusal of the local officers to approve and allow his homestead application when it was presented to them, in the fall of 1899.

We will consider these points in the above order, and cite same authorities in support of our views upon each of them.

I.

As to the jurisdiction of the court, in this matter, no question has been raised by either party and we cite authority only as a matter of percaution. After a disputed land claim, for any tract of public land has been heard, considered and determined, and patent therefor issued by the Secretary of the Interior, courts of equity have jurisdiction and will afford relief to either of the contesting parties, who may have suffered wrong, or who has been un-

justly and illegally deprived of any substantial right, or denied any substantial privilege.

Hewett vs. Schultz, 180 *U. S.* 136.

Marquez vs. Fresbre, 101 *U. S.* 473.

Johnson vs. Tawsley, 13 *Wall.* 72.

Moone vs. Robbinson, 96, *U. S.* 530.

Minnesota vs. Batchelder, 1 *Wall*, 109.

Tarpey vs. Madsen, 178 *U. S.* 215.

Sytle vs. Arkansas, 9 *Haw.* 614.

Ard vs. Brandon, 156 *U. S.* 537.

Shepley vs. Cawan, 91 *U. S.* 330.

In the case of *Hewett vs. Schultz* the court said:

> "Of course, if the ruling of that office is plainly erroneous, it would be the duty of the court to give effect to the will of Congress, for it is the settled doctrine of this court that the practice of a department, in the execution of a statute is material only when doubt exists as to its true construction."

In *Marquez vs. Fresbre* it is declared:

> "But if it can be made entirely plain to a court of equity that, on facts about which there is no dispute, or no reasonable doubt, the officers of the land department have, by a mistake of law, deprived a man of his right, it will give relief."

In *Minnesota vs. Batchelder* it is announced:

> "A court of equity will look into the proceedings before the Register and Receiver and even into those of the land office and other offices, where the right of property of the party is involved, and correct errors of law and fact to his prejudice."

In the case of *Johnson vs. Tawsley* the court holds:

"On the other hand it (the court) has constantly asserted the right of the proper court to inquire, after title had passed from the government, and the question became one of private right, whether, according to the established rule of equity, and the act of Congress concerning the public lands, the party holding the title should hold absolutely as his own or as trustee for another."

II.

The indemnity provisions of the railroad land grant acts of Congress made from time to time in the past, were drawn in language substantially alike, or, at any rate, the difference in the provisions of the respective grants, are so slight as to be immaterial in the consideration of the case at bar. So that the general rules of construction applied in the decision of other cases involving conflicting claims for indemnity land, will apply to this case also with equal force and with like weight.

We admit that it is well settled, by decisions of this Court, that in the primary limits the title in and to all those odd numbered sections, not excepted from the operation of this grant, is vested in the Company, instanter, as soon as an approved map of the definite location of their line of road, is filed in the General Land Office, and that, thereafter, no right will attach to any such odd numbered section, within the granted limits, in favor of an individual entry man, under the public land laws:

And we assert that it is equally well settled by

decisions of this Court, that no interest, right or title in or to any particular tract, within the indemnity limits, will attach in favor of the Company, at the time of filing the map of definite location of the line of road, at the time of filing application to select lieu lands, or at anytime until the Company's application to select has been approved of by the Secretary of the Interior.

The Railroad Company's application to select the land, here in suit, did not segregate it from the public domain, or reserve it from occupancy and entry under the homestead law of the United States, for the reason that the outer line of the indemnity limits of this land grant means nothing whatever, to or for the public, since the odd numbered sections within the indemnity limits are not granted to the state for the benefit of any railroad company, or otherwise, they must remain and be a part of the public domain and, like all other parts and portions of the public lands, are subject to be sold, granted, reserved, or otherwise disposed of by Congress, and, at the same time, they are also subject to occupancy and entry under the provisions of the homestead law.

The only service, of any kind, rendered or that can be rendered by the outside line of the indemnity limits of this grant, is that it restrains the company from taking public lands, outside to supply deficiencies within the granted limits.

Our contention is, in short, that, while the outer line of the indemnity limits restrains the Company

from going beyond it, in making applications for lieu lands, it is no bar to the public seeking homesteads on the interior of that line, that all odd numbered sections within indemnity limits of this grant, were open to the public, to be taken under the public land laws, as well as, at the same time, they were open to the Company to be applied for as lieu lands, that the mere occupancy of the individual homestead claimant, who had made no application, at the proper land office, to enter his claim, gave him no right as against the valid selection of the Company, and that the mere unapproved application of the Company to select as lieu land, does not debar or hinder the approval and allowance of a homestead entry on same land.

Opposing counsel disputes our contention "that the Company's unapproved application to select the land, here in controversy as lieu land, does not segregate the said tract from the public domain, or hinder the approval and allowance of a homestead entry upon the same, made in good faith, by a qualified homestead claimant."

We believe that the best evidence in support of our views, in this matter, is to be found in reported decisions heretofore rendered by this Court, and, therefore, we beg leave, at this time, to quote from a few leading cases in point.

The Court said: In the case of *Ryan vs. Central Pacific Railroad Company;* 99 *U. S.* 382; *Decided* 1879:

"Under the statute when the road was lo-

cated and the maps were made, the right of the Company to the odd sections first named became, ipso facto, fixed and absolute. With respect to the "lieu lands, as they are called, the *right was only* a *float* and *attached* to *no particular tracts, until* the selections were actually made *in the manner prescribed.*

In the case of *Cedar Rapids, etc., Railroad Company vs. Herring* 110 *U. S.* 27. Decided in 1884.

"It is obvious, however, that the right to these odd sections and the right to others, in lieu of such odd sections as have been previously disposed of, depend on very different circumstances, and it is not easy to see how rights could be vested in any particular section or sections of the latter class, until it is ascertained how many of the original odd numbered sections are thus lost, and until the grantee has exercised his right of selection. The latter unlike the odd numbers, within the six mile limit, are not ascertained and made specific by the protraction of the established line through the map of the public lands. They are not and cannot be made specific until the grantee's right of selection has been exercised. This Court, in construing the same clause of the grant to the California and Oregon Railroad Company 14 Statute at Large 239 said: "When the road was located and the maps were made the right of the Company to the odd sections first named became fixed and absolute. With respect to the "lieu lands," as they are called, the right was only a float, and attached to no particular tracts, until the selection was made *in the manner ~~presented~~ prescribed.*' "

Kansas Pacific Railroad Company vs. Atchinson, Topeka and Sante Fe Railroad Company. 112 *U. S.* 414, decided in 1884:

"The question, therefore, for determination

is, whether the grant to Kansas by Act of Congress of March 3, 1863, covered the title to these indemnity lands. We are clear that it did not. It granted only alternate sections designated by odd numbers, within the limit of ten miles, and from them certain portions were to be excepted. For what were thus excepted, other lands, were to be selected from adjacent lands, if any there remained to which no other valid claims originated. But what unappropriated lands would thus be found and selected could not be known before actual selection. A right to select them within certain limits, in case of a deficiency within the ten mile limit, was alone conferred, not a right to any specific land, or lands capable of identification by any principle of law or rules of measurement; neither locality nor quantity is given from which such lands could be ascertained. If, therefore, when such selections were to be made, the land from which the deficiency was to be supplied had been appropriated by Congress to other purposes, the right of selection became a barren right, for until selection was made the title remained in the government subject to be disposed of at its pleasure."

St. Paul and Sioux City Railroad Company vs. Winona and St. Peter Railroad Company 112 *U. S.* 720 decided in 1884:

"The reason for this is that no vested right can attach to land in place, the odd numbered sections within six miles of each side of the road, until these sections are ascertained and identified by a legal location of the line of road, so in regad to the lands to be selected within a still larger limit, their identification can not be known until the selection is made. It may be a long time after the line of road is located before it is ascertained how many sections or

parts of sections within the primary limits have been lost by sale or preemption. It may be still longer before selection is made to supply the loss. The plaintiff in error insists, that the map of its line of road was filed in 1859. The Court of original jurisdiction finds that up to the time of trial in October, 1878, a period of nearly twenty years, no selection of these lands had ever been made by the company or by anyone for it. Was there a vested right in this company during all of this time to have not only these lands, but all the odd numbered sections within the twenty mile limit, on each side of the line of road await its pleasure? Had the settlers in that populous region no right to buy of the government, because the company might choose to take them, or might after all that delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation and forbidden to cultivation?"

Barney vs. Winona and St. Peter Railroad Company, 117 *U. S.*, 228., *Decided* 1886

"In the construction of land grant acts in aid of railroads, there is a well established destinction observed between "granted lands" and "indemnity lands." The former are those falling within the limits especially designated and the title in which attaches, when the lands are located by an approved and accepted survey of the line of the road, filed in the Land Department, as of the date of the act of congress. The latter are those lands selected in lieu of parcels lost by previous disposition and reservation for other purposes and the title of which accrues only from the time of their selection."

Sioux City and St. Paul Railroad Company vs.

Chicago, Milwaukee and St. Paul Railway Company, 117 *U. S.*, 406, *Decided* 1886:

> "In the opinion above referred to it was held that while this rule applied to what are called lands in place, that is, those odd sections found within ten miles limit of the road, as those ten miles conflict with each other, it did not apply to lieu lands or indemnity lands which were to be selected outside of the ten mile limit. The reason of this was said to be that, with regard to the odd sections found within the original limits of the grant undisposed of when the line of road was definitely located, that location ascertained the sections which passed by the grant and fixed the right to such sections whether it was the whole or the moiety of them. But no title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained and the selection made, approved by the Secretary of the Interior."

Wisconsin Central Railroad Company vs. Price County et al, 133 *U. S.* 496, decided 1890

> "But as to the remainder of the lands taxed, which fell within the indemnity limits, the case is different. For such lands no title could pass to the company, not only until the selections were made by the agents of the state appointed by the governor, but until such selections were approved by the Secretary of the Interior. Bnt that officer never approved of them, nor can such approval be inferred from his not formally rejecting them. "The approval of the Secretary was essential to the effacacy of the selections and to give to the company any title to the land selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiencies

in the land granted to the company, which were to be supplied from indemnity lands, and, in the second place, whether the particular lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any preemption or homestead right had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated and what portion still remained. "Until the selections were approved, there were no selections, in fact, only preliminary proceedings taken for that purpose, and the indemnity lands remained unaffected in their title. Until then the lands which might have been taken as indemnity were incapable of identification, the proposed selections remained the property of the United States.

The government was indeed, under promise to give the company indemnity lands in lieu what might be lost by the cases mentioned. But such promise passed no tile, and, until it was executed, created no legal interest that could be enforced in the courts."

After referring to some former decisions involving indemnity land questions, the court concludes this Wisconsin Central case by saying:

"The uniform language is, that no title to indemnity lands becomes vested in any company or in the state until the selections are

made; and they are not considered as made until they have been approved, as provided by statute, by the Secretary of the Interior."

United States vs. Missouri, Kansas and Texas Railway Company, 141 *U. S.* 358, decided 1891:

"We say prior to such selection and approval, because as to lands which may be legally taken for purposes of indemnity, the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted, but in the fullest legal sense remains in the United States until they are actually selected and set apart, under the direction of the Secretary of the Interior especially for indemnity purposes.

New Orleans Pacific Railway Company vs. Parker 143 *U. S.* 42, decided 1892:

"Now it has long been settled that while a railroad company, after its definite location acquires an interest in the odd numbered sections within its place or granted limits, which interest relates back to the granting act, the rule is otherwise as to the lands within the indemnity limits. As to lands of the latter class, the company acquires no interest in any specific section until a selection is made with the approval of the Land Departmennt.

"Having regard to the adjudicatal cases it is to be taken as established that unless otherwise expressly declared by congress, no right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction of the Secretary of the Interior."

Humbird vs. Avery, 195 *U. S.* 480, Decided 1904:

"This conclusion is fortified, if not absolutely demanded by another consideration, namely, that no title to intemnity lands is

vested until a selection be made by which they are definitely ascertained and the selection made approved by the Secretary of the Interior. This principle is firmly established. A full statement of it is found in the *Wisconsin Central Railroad Company vs. Price County*, 133 *U. S.* 496.

Sjuli vs. Dreschel, 199 *U. S.* 564, decided 1905:

"That no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior."

"That up to the time such approval is given, lands within idemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the preemption and homestead laws of the United States," and

"That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits, which have not been previously selected, with his approval to supply deficiencies within the place limits of the company's road." * * *

"The company's unapproved selections did not therefore, stand in the way of the lands being occupied and entered under the homestead laws. The mere filing of its lists of selections of indemnity lands did not have the effect to exclude them from occupancy under the preemption and homestead laws. On the contrary, notwithstanding the filing of such lists, they remain open as before, to settlement or occupancy under those laws until the selections were formally approved by the Secretary of the Interior and the lands withdrawn from settlement or sale."

In the late case of *Brandon vs. Ard*, 211 *U. S.* 11, decided in 1908, after reviewing the facts of the

case, the court refers to, quotes from at length, and follows, as the law of the case, the doctrine announced in the Sjoli case, thus saying to the profession and to the public, that the rules laid down in that case were general in their application, whereever there are conflicting claims between an individual entryman and a railroad company for lands within its indemnity limits.

On the authority of all these cases hereinbefore referred to we assert that the rule laid down so clearly in the Sjoli case, also governs and disposes of the case at bar.

It is irrelevant that Sjoli settled upon his claim in 1884, and prior to the company's application to select it, in 1885, since he did not apply to enter it as a homestead or otherwise, until 1889, four years after the company's application.

It is well settled that an individual entryman acquires no interest in lands as against a railroad company by mere occupancy, or until he has made application to the proper local land office to enter his claim under some one or other of the public land laws.

Kansas Pacific Railroad Company vs. Dunmeyer, 113 *U. S.*, 629;

Hastings and Dakota Railroad Company vs. Whitney, 132 *U. S.*, 357;

Whitney vs. Taylor, 158 *U. S.*, 85;

Northern Pacific Railroad vs. Colburn, 164 *U. S.* 383;

Northern Pacific Railroad Company vs. Sanders, 166 *U. S.*, 620.

Tarpey vs. Madsen, 178 *U. S.*, 214.

In the Tarpey case last above cited, the Court says:

> "Oral evidence, therefore, of the date of occupancy, may be decisive of the controversy between such individual applicants for a tract of public land, but by decisions of this Court running back to 1882, as between a railroad company holding a land grant and an individual entryman, the question of right has been declared to rest, not on the mere matter of occupancy, but upon the state of the record."
>
> "Recapitulating, we are of opinion that a proper interpretation of the acts of congress making railroad grants like the one in question, requires that the relative rights of the company and an individual entryman must be determined, not by the act of the company in itself, fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence on the one part, the filing of the map in the office of the Secretary of the Interior, and, on the other the declaration and entry in the local land office. In this way, matters resting on oral testimony are eliminated, a certainty and definiteness is given to the rights of each, the grant becomes fixed and definite, and, while as repeatedy held, the railroad company may not question the validity and propriety of the entryman's claim of record, its rights ought not to be defeated * * * by fugitive and uncertain testimony of occupation."

The railroad company acquired no interest in the land claimed by Sjoli, by reason of their application to select it made in 1885, because that appli-

cation had not been approved by the Secretay of the Interior.

This is the theory acted upon by the Land Department, when they allowed Sjoli's entry, accepted his final proof and passed his claim to patent, and it is the theory acted upon by this Court when they upheld his claim for the land.

Under the decisions hereinbefore cited, we repeat Sjoli's occupancy of his claim prior to the company's application to select it in 1885, is irrelevant and immaterial. It gave him no right as against the company since he had not then applied to enter it under any one of the public land laws, and, at the same time, the railroad company's applications made as above stated gave ~~him~~ them no right since it was not approved as required by law.

Accordingly, when Sjoli applied to enter his claim in 1889, it was in the very same condition, so far as the rights of the company were concerned, as was the land in the case at bar, when Fred Wass made his homestead application for it in 1899.

If it be said that the Secretary of the Interior never approved the company's selection of the land in the Sjoli case, we will admit that the Secretary did interpret the law correctly in awarding his claim to Sjoli, and in rejecting the company's claim therefor.

Since Sjoli had not made his application to enter the land, when the company applied to select it in 1885; under the decision in the Tarpey vs. Wadren case, Supra, it was not distinguished in

any respect from the status of the land in the Wass case, when he applied for homestead entry in 1899.

The Wass case and the Sjoli case, therefore, were both alike, and in the same status, when each of the entrymen made his application at the local land office to initiate his claim; as the Secretary's erroneous approval of the company's application to select the land in the Wass case, was a mere nullity. That is, in other words, we may say, truthfully, that the Secretary of the Interior never approved the company's application to select the land in the Wass case, as required by law. Had this Wass case received the careful attention it was entitled to, when in the Land Department for adjustment, it would have appeared, as in the Sjoli case, that a homestead right had already attached to the land, and that, therefore, it was not then subject to selection or to approval as indemnity land.

Since the Sjoli case and the Wass case are alike in all material respects, we insist that the decision in the Sjoli case should dispose of the Wass case also.

III.

The common law fiction of relation does not apply in the case at bar.

The best answer to the contention that the common law fiction of relation applies in this case, so as to make the Secretary's approval, in 1905,

relate back and make the selections valid as if the date of the applications in 1892: is found in the Sjoli case, Supra.

> "The company's unapproved selections did not, therefore, stand in the way of the lands being occupied and entered under the homestead law. On the contrary, notwithstanding the filing of such lists, they remained open, as before, to settlement, or occupancy under those laws, until the selections were formally approved by the Secretary of the Interior, and the lands withdrawn from settlement and sale."

As hereinbefore shown, the rule in the Sjoli case is announced in a number of other cases including.

Kansas Pacific R. R. Co. vs. Atchinson R. R. Co., 112 *U. S.*, 414;

United States vs. Missouri K. & T. R. R. Co., 141 *U. S.*, 358.

Oregon and California R. R. Co., vs. United States, 189 *U. S.*, 100;

Wisconsin Central Railroad Co., vs. Price Co., 133 *U. S.*, 496;

Humbird vs. Avery, 195 *U. S.*, 480;

Brandon vs. Ard, 211 *U. S.*, 11.

Directly in point, also, is the case of Flint and Pere Marquette Railway Company vs. Gordon, 41, Michigan 420, in which case Judge, Thomas M. Conley, speaking for the court, said:

> "That doctrine is remedial, and is used in the law to prevent wrong and punish trespass. As has been repeatedly declared in this Court, it can never be so applied, as to make that wrong which was innocent when done, or so

> as to divest rights, which, by sanction of law, have been acquired since the time from which the relation dates."

In construing a land grant, and in construing the homestead law, the will and intention of Congress, not common law fictions, must be kept in view.

Missouri, Kansas & Texas R. R. Co., vs. Kansas Pacific R. R. Co., 97, *U. S.*, 491.

United States vs. Southern Pacific Railroad Co., 146 *U. S.*, 570;

Wisconsin Central R. R. Co., vs. Forsyth, 159 *U. S.*, 46.

In the case of the Missouri, Kansas and Texas Company, Supra, the Court declares:

> "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made, is a law as well as a conveyance, and that such effect must be given it, as will carry out the intent of congress. That intent should not be defeated by applying to the result the rules of the common law, which are properly applicable only to transfer between private parties. To the validity of such transfer it may be admitted that there must exist a present power of identification of the land, and that where no such power exists, instruments, with words of present grant, are operative, if at all, as contracts to convey, but the rules of the common law must yield in this, as in all other respects, to the legislative will."

The will of congress, then, as interpreted by the Courts, is the thing to be kept in view in determining this matter. The intent of congress, in all of its acts dealing with the public lands, has

been to give a preference right to the individual settler. This intent is seen in the preemption laws, it is seen in the homestead laws, and it is seen in each and every of the several congressional acts, granting public lands in aid of the construction of railroads.

In the preemption and in the homestead laws the intention of Congress is obvious and needs no exposition. In the railroad land grants, care has been taken to expressly except from the operation of the grant, all those tracts within the primary limits, occupied by settlers claiming under the preemption and homestead laws, prior to the definite location of the line of road.

Since Congress accepted from the operation of the grant all tracts thus occupied and claimed within the primary limits, it is reasonable to assume that they would not change the rule within the indemnity limits, where the lands were not granted to the Company.

Had it been practicable for Congress to have kept the administration of the indemnity provisions of the land grant in its own hands, there can be no doubt, that the settler upon odd numbered sections, claiming under the homestead law, prior to their selection by the Company, in the manner prescribed, would have been given, like those in the place limits, a prior right as against the Company, and it is a reasonable inference that in delegating authority to the Secretary of the Interior to

act for them, they would have him carry out their intention in that respect.

That the intention of Congress is and always has been, to give the actual settlers upon public lands a prior and superior right over other persons or parties, has been frequently declared by the Court.

In the case of *Clements vs. Warner*, 65 *U. S.*, 394, the Court said:

> "The policy of the Federal Government, in favor of settlers upon public lands, has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land comprehending their improvements, over that of any other person."

This decision rendered in the year 1861, before the enactment of the homestead law, and relating to a preemption claim, speaks of the settler's superior equity to purchase a limited extent of land as a home. But in the subsequent case of *Ard vs. Brandon*, 156 *U. S.*, 537, involving the right of a homestead entry, after declaring that the law deals tenderly, with one, who, in good faith, goes upon public land, with a view of making a home thereon, the Court adopts and incorporates, into the Ard vs. Brandon decision, the above citation from the case of Clements vs. Warner.

The case of *Clements vs. Warner* and that of *Ard vs. Brandon* are referred to approvingly by in the later case of

Northern Pacific Railroad Company vs. Amacker, 175 *U. S.*, 563, and in the case of *Tarpey vs.*

Madsen, 178 *U. S.* 214, thus showing that, after its long and varied experience in dealing with this class of cases, the Court holds as well settled, the principle that the intent of Congress is, and always has been, to give the actual settlers upon public land, in good faith, claiming for himself a home, a prior and superior right over any other person or party. And this, it seems to us, ought to settle, against the contention of the Company, their claim to the land in suit, under or by virtue of the aforesaid fiction of relation.

The case of *Shepley vs.* ~~Garran~~ Cowan, 91 *U. S.*, 330, is cited by opposing counsel as a case in point illustrating the operation of the fiction of Relation, in cases similar to the case at bar. But an examination of that case will reveal the fact (1) that the Shepley case is not similar to the case at bar, and (2) that the decision in that case rests upon the act of Congress approved March 3, 1853, 10 Stat. at L. 244, Chap. 143, rather than upon the aforesaid *fiction of relation*.

The land in question in the Shepley case was embraced in the confirmed French grant made to the Village of Carondelet before the date of the Louisana Purchase. As such confirmed French grant it was not a part of the public domain in 1835, when the individual claimant offered his preemption filing, or in 1849, when the State of Missouri selected it on account of its swamp land grant.

In 1862, this Court held the French grant invalid so far as the Shepley claim was concerned, and, owing to the facts in the case the, tract fell under the operation of the act of March 3, 1853, above cited and the relevant part of which reads as follows:

> "And provided further, that any settler who has settled or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish or other grants, which have been or shall be hereafter declared by the Supreme Court of the United States, to be invalid, shall be entitled to all the rights of preemption granted by this act, and the act of fourth of September, eighteen hundred and forty one entitled 'An act to appropriate the proceeds of the public lands and to grant preemption rights,' after the lands shall have been released from reservation, in the same manner as if no reservation existed."

After the land in the Shepley claim had been released from the reservation by a decision of the Court, the heirs of Chartrand, claimed and secured the land under the act of Congress, and the fiction of relation was not needed in the decision of the case.

Selections by the state on account of its swamp land grant, the filing of a preemption statement by an individual, the making of a homestead entry by a qualified claimant, and the filing of the map of the definite location of its line of road, by a railroad company, all rest upon the same authority, an act of Congress, and all

fall under the operation of the same rule, as to the attachment of right and the vesting of title.

In neither of these cases does the attachment of right or the vesting of title depend upon the action of the Secretary of the Interior, or upon the action of any other officer of the Land Department; but the attachment of such right and the vesting of such title springs directly out of the act of Congress, in pursuance of which the claim is made, when followed up by a compliance with the provisions of such act.

In such cases the initiatory steps taken by the claimant, when followed by a compliance with the law, extends forward and requires, not a title, for the claimant has that, but record evidence of title. The only service the officers of the Land Department can render in such cases is to mark up on their records the description of such tracts of land as were designated and made certain by the state selection, the preemption filing, the homestead application, or the railroad map of definite location, and to issue as record evidence of title, such lists certificates, or patents as are usual in such cases.

What I mean to say here is that the action of the Secretary is not discretionary in any of these four cases, he has only ministerial work to perform, and his action does not relate back in any way to affect the attachment of right or the vesting of title. These are controlled exclusively by the act of Congress and the action of the claimant.

Therefore it is true that, when a state swamp

land grant selection and a preemption filing for the same tract of land are in conflict as in the case of Shepley vs. Cowan, that one which is first in time is first in right.

The act of March 3, 1853, granted the heirs of Chartrand a prior right on account of the settlement and declaration of their ancestor, in 1835. That act of Congress, and not the fiction of relation, decided the case in their favor.

In the case at bar the claim of the settler and the claim of the Company have not a common origin. The settler takes directly under the act of Congress, the homestead law, while the Company takes, if at all, under the act of the Secretary of the Interior, in pursuance of the indemnity provisions of the grant.

The settler having occupied the land and applied to enter it as a homestead in the year 1899, his right attached and his title vested as of that year, and, having been followed up with a full compliance with the law, his right and title so initiated, reaches forward and requires the issue of a patent in his favor, after the expiration of five years, unless the land was previously embraced in some superior valid claim.

The Company's unapproved selection lists is all that stood in the way of the allowance and approval of the Wass entry. As we understand the law and the ruling of the Court, the Company gained no right by merely filing its lists of applications, nor could any right attach in favor of the

Company until the lists were approved by the Secretary of the Interior.

In the case at bar the approval of the Secretary was not given until the month of February, 1905, which was more than five years after the right of the settler had attached and the title had vested in Fred Wass, under the operation of the homestead law.

If the rule "first in time, first in right," is sound in law, as argued by opposing counsel, then there can be no doubt that the settler, Fred Wass, holds the land under that rule.

It is not an answer to this to say that we are taking for granted the very point in issue, or that we are begging the question, since the rule we are contending for and relying upon here, which is that lands, within the indemnity limit, were never granted to the Company or to the state by Congress, and that the only right that can attach to such lands in favor of the Company, originates, not in the act of Congress, not in the act of the Company, but in the act of the Secretary of the Interior, has been repeatedly declared by this Court, as we understand the language of the decisions hereinbefore cited.

From all of which it appears that the case of Shepley vs. Cowan is not in point, and that the doctrine of relation cannot apply to the case at bar.

The case of *McCreery vs. Haskill*, 119, *U. S.*, 327, is also cited in support of the contention that the

doctrine of relation applies in such cases as the one at bar. But this decision was rendered under the provisions of an act of Congress approved July 23, 1866, for the quieting of land titles in California, 14 Stat. at L. 218; Section 6, of which reads as follows:

> "And be it further enacted that an act entitled "an act to provide for the survey of public lands in California, the granting of preemption rights and for other purposes" approved March 3, one thousand, eight hundred and fifty-three, shall be so construed as giving the State of California the right to select for school purposes, other lands in lieu of such sixteenth and thirty-sixth sections as were * * * covered by grants made under Spanish and Mexican authority * * * or where such sections would be so covered if the lines of the public survey were extended over such lands, which shall be determined * * * in case of Spanish or Mexican grants, when final survey of such grant shall have been made. The surveyor general for the State of California shall furnish the state authorities with lists of such sections so covered, as a basis of selection, such selection to be made from surveyed lands, and within the same land district as the section for which the selection is made."

It appeared upon the plat of the survey made under the direction of, and approved by the surveyor general for the State of California, and filed in the District Land Office at San Francisco, that section sixteen and thirty-six of the township, were embraced in the confirmed Mexican grant known as "Sausal Redondo Rancho," were set off to the grantee in pursuance to the act of Congress above

mentioned, were thus lost to the state from its grant for school purposes, and were thus officially designated as a proper basis for the selection of lieu land to the extent of these two sections.

It appears also that, after the surveyor general for the State of California, had furnished the state authorities, lists showing sections sixteen and thirty-six of the township covered by a confirmed Mexican grant, and set off to the grantee as required by law, the state, on the 22nd of April, 1868, selected, in part satisfaction of the loss in section sixteen the tract of land afterwards settled upon and claimed by McCreery under the preemption law.

The land thus selected by the state was public land, within the same land district as the section lost, and entirely free from all other claims or rights at the date of the selection as above mentioned. This selection in behalf of the state was made more than a year and a half before McCreery settled upon the land or otherwise attempted to initiate his claim thereto under the preemption law.

The right of the state to make this selection and the right of the individual to take the land under the preemption law have a common origin. They each rest upon an act of Congress and neither of them is dependent upon the action or the discretion of the Secretary of the Interior. When followed up by a compliance with the provisions of the act under which it is made the selection of the state or the filing of the individual, *whichever* is *first* in *time* is *first in right*, *reaches* forward to the ful-

fillment of the law, and requires, as a right, from the proper officers of the Land Department, record evidence of the descriptions of the land, in which their right has attached and their title vested under the act of Congress.

Wright vs. Roseberry, 121 *U. S.*, 488.

Since, then, the officers of the Land Department had no discretion to exercise in the McCreery case and rendered therein only ministerial service, it is idle to say that their action relates back in any direction, any distance, or for any purpose.

In the case at bar the settler takes under the act of Congress, the Company under that of the Secretary, and the case of McCreery is far from being in point.

Neither is the case of Campbell vs. Doe, 13 *How.*, 244, in point. In that case the Secretary of the Treasury, under whose jurisdiction such matters then were, had authorized and directed the selection of this land for school purposes, before Campbell was inadvertantly allowed to enter it. And, therefore, the selection for the state was first in time.

Other cases cited to support the fiction of relation are widely distinguished from the case at bar.

In the case of Gertgens vs. O'Connor, 191 *U. S.*, 237, the settlement of Gertgens upon the land was

made after the passage of the Act of Congress approved March 3, 1887, 24 Stat. at L. 556, and his right to a homestead entry thereon was barred by the statute, and the facts of the case, all of which were well known, or should have been well known to Gertgens when he took possession of the land in April, 1891.

In the case of the *United States vs. Anderson*, 194, *U. S.*, 394, the action was brought to recover damages for a trespass committed upon the land in question by the removal therefrom of a considerable quantity of iron ore and valuable limestone rack. And damages for tresspass in cutting and carrying away valuable timber, was the cause of the action in the case of *Musser vs. McRal*, 44 *Minn.*, 343.

Neither of the two cases last above mentioned is similar to the case at bar; and each of them is so widely distinguished from it as to need no further attention from us.

In such search as we have been able to make, we have been unable to find in the reports of this court, any case similar to the one at bar, where the land has been awarded to the Company, and the claim of the settler rejected under the operation of the fiction of relation. And, since no such case has been cited by opposing counsel, the inference is very strong, that there is no such case in the reports.

In arguing the case thus far, no attention has been given to the decisions of the United States

Land Department, for the reason that those decisions are not in harmony with the decisions of this Court; they are not always in harmony with each other, and in so far as they are in conflict with the Court decisions cited in support of this defendant's case here at bar, they are without weight and properly disregarded.

IV.

Defendant's right to possession of this land is in no way affected by the refusal of the Register and Receiver of the local United States Land Office to approve and allow application when it was prevented as aforesaid, in 1899.

Ard vs. Brandon, 156, *U. S.*, 537;
Shepley vs. Cowan, 91, *U. S.*, 330;
Frisbie vs. Whitney, 76, *U. S.*, 187;
Syttle vs. Arkansas, 9 *How.* 314.
Wirth vs. Branson, 98, *U. S.*, 118.
Stark vs. Stark, 6. *Wall.*, 402.

It appears, from an examination of the authorities cited in the foregoing pages, that the land in suit, was not granted to the Territory or to the subsequent State of Minnesota to aid in the construction of railroads or for any other purpose whatever. Nor does it appear to have been reserved for the benefit of any railroad company by the indemnity provisions of the land grant in question. It was open, therefore, to occupancy and entry under the homestead law, when Wass applied for it, at the local land office in 1899, and

the presentation of his application operated to segregate his claim from the public domian, so that, thereafter, it was not open to selection or to approval as indemnity land.

Fred Wass is claiming the land in issue, under the homestead law, and by virtue of his compliance in all respects with the provisions of the same.

His qualifications, good faith and compliance with the law are not disputed or questioned in the pleadings, but are fully admitted by the filing of a demurrer to his answer in the trial Court as exhibited in the record.

Accordingly we ask that the order and decree of the Supreme Court of the State of Minnesota be affirmed in all respects, and that the prayer of defendants in their answer made, be granted and allowed.

P. B. GORMAN,

Solicitor for Defendant in Error,

St. Cloud, Minn.

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No. 181.

Supreme Court of the United States

OCTOBER TERM 1910

Supreme Court U. S.
FILED
JAN 17 1911
JAMES H. McKENNEY,
Clerk

NORTHERN PACIFIC RAILWAY COMPANY

Plaintiff in Error

vs.

FRED WASS AND PAULINE WASS

Defendants in Error

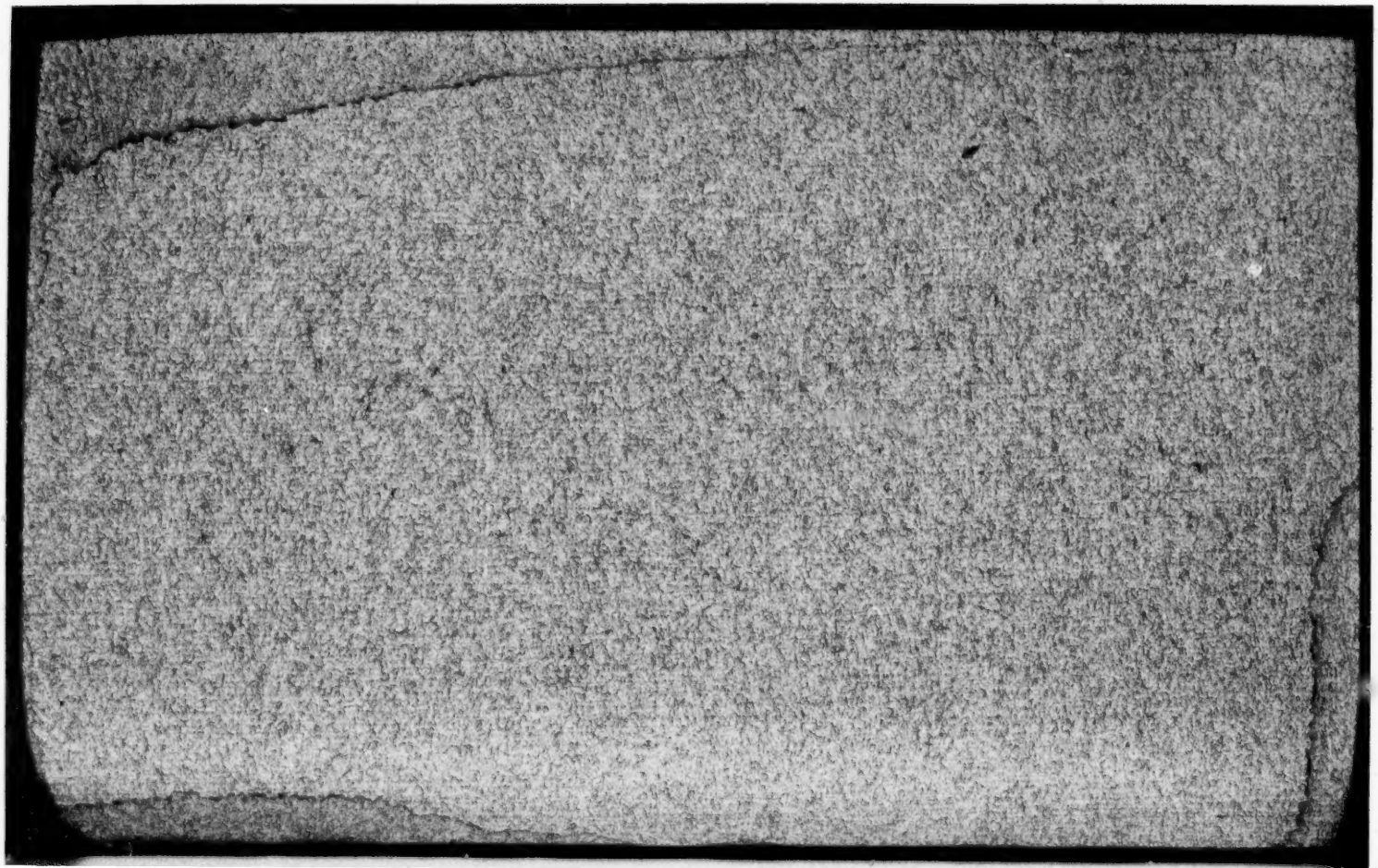
RE-ARGUMENT

BRIEF FOR DEFENDANTS IN ERROR

P. B. GORMAN

SOLICITOR FOR DEFENDANTS IN ERROR

ST. CLOUD, MINN.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1910.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

FRED WASS AND PAULINE WASS, His Wife,
Defendants in Error.

RE-ARGUMENT.

STATEMENT.

The land, here in controversy, lies within the indemnity limits of the land grant made to the Territory of Minnesota by act of Congress approved March 3, 1857, and also within the indemnity limits of the grant made to the State of Minnesota by the act of Congress approved March 3, 1865, and is described as follows: The southeast quarter (SE¼) of section thirteen (13), township one hundred twenty-nine (129), north of range thirty-two (32) west of the fifth principal Meridian and situate in Todd County, Minn.

Twenty years after the passage of the act of Congress making this land grant, and after unsuccessful attempts to secure the building of that part of one of its branch lines of railroad, lying between Watab and Crow Wing, the said State of Minnesota, by an act of its legislature, approved

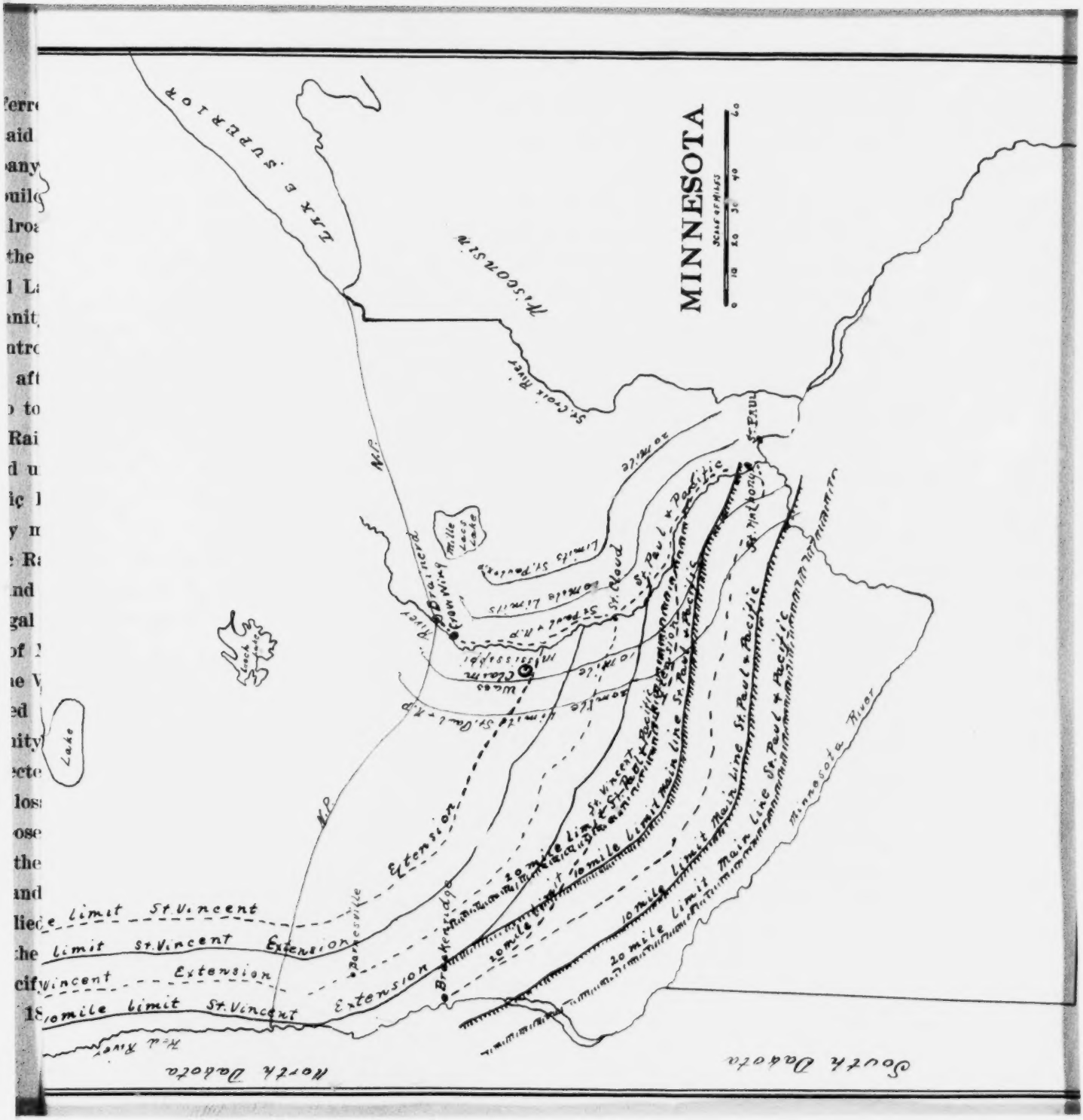
March 1, 1877, conferred all its interest and right in and to the aforesaid land grant, upon the Western Railroad Company of Minnesota, which company proceeded to build, and did build, equip, and operate a line of railroad between the points above mentioned, and, in the fall of 1877, said company filed, in the General Land office a list of applications to select indemnity land, which list embraced the tract here in controversy.

Subsequently and after the building of the line of road from Watab to Crow Wing in said state, the said Western Railroad Company of Minnesota was reorganized under the name of St. Paul and Northern Pacific Railway Company.

And thereafter by means of legal proceedings the Northern Pacific Railway Company came into possession of the land grant, here involved, and thus became the legal successor of the Western Railroad Company of Minnesota.

As stated above the Western Railroad Company of Minnesota applied to select the tract above described, as indemnity land, in the fall of 1877, but failed and neglected, at that time or at any time, to designate a loss, in its primary limits, as a basis for the purposed selection. Twelve years later, and in 1889, the same company under its new name, St. Paul and Northern Pacific Railway Company, again applied to select this tract as indemnity, but, as in the former application, failed and neglected to specify a basis for the purposed selection. February 1892 the company applied,

LAKE SUPERIOR
Rainy Lake
Lake of the Woods
Red
Lake
Leech Lake
20 mile limit St. Vincent
10 mile limit St. Vincent Extension
St. Vincent Extension
10 mile limit St. Vincent
St. Vincent
Red River
North Dakota


MINNESOTA
Lake Superior
Wisconsin
St. Croix River
Mississippi River
Minnesota River
St. Paul
Minneapolis
Duluth
St. Cloud
Brainerd
Mille Lacs Lake
Red Lake
Lake
Limits St. Paul & M.R.R.
St. Paul & Pacific
St. Vincent Extension
Extension
Main Line St. Paul & Pacific
10 mile limit
20 mile limit
North Dakota
South Dakota

a third time, to select this tract as lieu land and designated, for the first time, a basis for the selection.

Neither of the above mentioned three applications was approved by the secretary of the Interior, as required by law, or otherwise, and each and all of said applications, were invalid and without force or effect, at the time Fred Wass settled upon said land in April 1899, with the bona fide intention of entering it under the homestead law, and at the time he presented his homestead application, therefor, to the Register and Receiver of the district, wherein the land was located, in the fall of 1899.

In the spring of 1899, Defendant in error, Fred Wass, went upon the land, built a house and moved his family into it, and has remained in possession and occupancy continuously up to the present time, and he is living there now. The same summer he built a stable, dug a well, and made such other and further improvements upon the place, as were found to be necessary and convenient for a poor family just starting out on a homestead. He has added to his improvements, each year, in the way of grubbing, clearing and breaking until, at the beginning of this suit, his improvements were worth and of a value in excess of twelve hundred dollars.

In December, 1899, Mr. Wass made application at the local land office in St. Cloud, to enter the land under the provisions of the homestead law.

His application was rejected, by the local officers, and his money, tendered as fees and commissions, was refused upon the ground, that the land applied for was embraced in a then pending though unapproved indemnity selection theretofore, applied for by the St. Paul and Northern Pacific Railway Company.

Mr. Wass appealed from the ruling of the local officers and their action was approved and affirmed by the Commissioners of the General Land Office, and by the Secretary of the Interior, respectively.

In February, 1905, the Secretary of the Interior approved the application of the company to select this land, and, on the 15th day of March of the same year, a patent therefore was issued by the United States, to the State of Minnesota for the benefit of the railway company entitled thereto, and thereafter, the patent of the State of Minnesota for said land, was issued to, and in favor of, the Northern Pacific Railway Company, Plaintiff in error herein.

Wass and his family were in possession of and occupying the place as a home, at the time the patent was issued to the railway company by the State of Minnesota. The company brought an action in ejectment against Wass and his wife to oust them from possession. The case was tried in the district court of Todd County, before the court, without a jury, and judgment rendered as shows in the record (page 10 to 13) in favor of Defendants Wass and wife.

On appeal the decision of the trial court was affirmed by the supreme court of Minnesota (record page 22 to 29) and the questions involved are brought here from that court on a writ of error.

QUESTIONS INVOLVED.

The question involved in this case is, whether the right of Defendants in error in and to the land here in controversy, under the Homestead Law is superior to the Claim of Plaintiff in error, under the indemnity provisions of its Land Grant.

The trial court and the supreme court of the State of Minnesota decided that the rights of Defendants in error are superior. And, in order to maintain and uphold that decision, it will be necessary to discuss the following propositions:

1. The tract of land in issue in the Wass case was not needed to help make up the quantity of land granted to the Territory and State of Minnesota to aid in the construction of a railroad from Stillwater by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch from St. Anthony, via St. Cloud and Crow Wing in said State.

2. The right of a duly qualified claimant, under the Homestead Law attaches to public land immediately and directly under the act of Congress, as soon as he has applied to enter, has settled upon, and has begun to improve the same,

without the aid of any action or thought on the part of the Secretary of the Interior.

3. The claim of a railroad company to and for lieu lands, under the indemnity provisions of their land grant does not attach immediately or directly under the act of Congress, but mediately or indirectly through and by reason of the action and judgment of the Secretary of the Interior.

4. The Secretary of the Interior, under the authority conferred upon him by the acts of Congress involved in this case can not apply a rule of law that is retroactive in its operation, so as to cut out and eliminate the rights of a homestead settler, who has resided upon, improved, and applied to enter the land before the said Secretary has approved the same to the railroad company.

5. The odd numbered sections within the indemnity limits of a railroad land grant are open to occupancy and entry under the Homestead Law, until they have been selected and approved to the company by the Secretary of the Interior in accordance with the provisions of law.

6. The Common Law Fiction of Relation does not operate to determine conflicting questions of title to real estate.

7. The rights of defendants in error in and to the land here in issue were not affected by the refusal of the Register and Receiver to approve and place their application of record, or by the failure of other officials of the land department

to correctly interpret and justly administer the law.

ARGUMENT.

A brief inspection of each of the acts of Congress having a bearing upon the status of the land, is necessary at the outset. And the first of these acts was approved March 3, 1857, (11 Stat. 195):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That there be and is hereby granted to the Territory of Minnesota, for the purpose of aiding in the construction of railroads, from Stillwater by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood River, with a branch via St. Cloud and Crow Wing to the navigable waters of the Red River of the North, at such point as the Legislature may determine; * * * * every alternate section of land, designated by odd numbers, for six sections in width, on each side of said roads and branches; but in case it shall appear, that the United States have, when the lines, or routes of said roads and branches are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent, or agents to be appointed by the Governor of said Territory or future State to select, subject to the approval of the Secretary of the Interior, from the lands of

the United States, nearest the tiers of sections above specified, so much land, in alternate sections or parts of sections as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the right of pre-emption have attached as aforesaid: which lands thus selected in lieu of those sold, and to which pre-emption rights have attached as aforesaid together with the sections and parts of sections designated by odd numbers as aforesaid and appropriated as aforesaid) shall be held by the Territory or future State of Minnesota for the use and purpose aforesaid: Provided, That the land to be so located shall, in no case, be further than fifteen miles from the lines of said roads or branches, and selected for and on account of each of said roads or branches: Provided, further, That the lands hereby granted for and on account of said roads and branches, severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of as the work progresses and the same shall be applied to no other purposes whatsoever: And provided, further, that any and all lands heretofore reserved to the United States, by act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are

hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads and branches through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States. * * * * *

Section 3. And be it further enacted, That the said lands heretofore granted to the Territory or future State of Minnesota shall be subject to the future disposal of the Legislature thereof for the purpose herein expressed and no other.

Section 4. And be it further enacted, That the lands hereby granted to said Territory, or future State shall be disposed of by said Territory or future State only in the manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections for each of said roads and branches, and included within a continuous length of twenty miles of each of said roads and branches may be sold; and when the Governor of said Territory or future State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads or branches is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of such roads and branches having twenty continuous miles completed as aforesaid and included within a continuous length of twenty miles of each of such roads or branches, may be sold, and so on from time to

time until said roads and branches are completed, and, if any of said roads or branches is not completed within ten years (from the date of the approval of this act) no further sales shall be made, and the lands unsold shall revert to the United States. * * * *

The next legisiation in order of time is, "A Joint Resolution authorizing the State of Minnesota to change the line of certain branch railroads in said State and for other purposes."

Approved July 12, 1862. (12 Stat. 624.)

Whereas, by act of Congress approved March 3, 1857, there was granted to the Territory of Minnesota, lands to aid in the construction of a railroad from Stillwater by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via St. Cloud and Crow Wing to the navigable waters of the Red River of the North, the northern terminus of which was to be fixed by the legislature of said Territory at St. Vincent, and,

Whereas it is now believed that the public interests require a change of location of a part of said branch road: Therefore,

Be it resolved by the Senate and House of Representatives of the United States of America in Congress Assembled that, in lieu of that part of the railroad grant to Minnesota Territory by act of Congress approved third March eighteen hun-

dred and fifty-seven, which extends northwesterly from the intersection of the tenth standard parallel with the fourth guide meridian, there shall be granted to the State of Minnesota the alternate sections within six mile limits of such new branch line of route as the authorities of the State may designate, having its southwesterly terminus at any point on the existing line between the Falls of St. Anthony and Crow Wing, and extending in a northeasterly direction to the waters of Lake Superior, with the right of indemnity between the fifteen mile limits thereof, Provided that this resolution shall take effect from the filing in the General Land Office of the acceptance by the authorities aforesaid of such substitution, whereupon the land north of the intersection in the grant aforesaid as authorized by the said act of third March eighteen hundred and fifty-seven, being by said acceptance disencumbered of the railroad grant, shall be dealt with as other public ands of the United States.

Act of Congress Approved March 3, 1865.

An act extending the time for the completion of certain land grant railroads in the States of Minnesota and Iowa and for other purposes. (13 Stat. 526.)

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress Assembled, That the quantity of lands granted to the State of Minnesota, to aid in the

construction of certain railroads in said State, as indicated in the first section of an act entitled "an act making a grant of lands to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State, approved March third eighteen hundred and fifty-seven, shall be increased to ten sections per mile for each of said railroads and branches, subject to any and all limitations contained in said act and subsequent acts and as hereinafter provided.

Section 2. And be it further enacted, That the first proviso, in the first section of the act aforesaid shall be so amended as to read as follows, to wit: Provided, That the land to be located shall, in no case be further than twenty miles from the line of said roads and branches, to aid in the construction of each of which said grant is made, and said lands granted shall, in all cases, be indicated by the Secretary of the Interior.

Section 3. And be it further enacted, That any and all lands heretofore reserved by the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or other purpose whatever, be and the same are hereby reserved and excepted from the operation of this act, except so far as may be found necessary to locate the route of said road through such

reserved lands, in which case the right of way shall be granted subject to the approval of the President of the United States: Provided, further, That any lands which may have been granted to the Territory or State of Minnesota, for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant, or grants, shall be deducted from the full amount of lands hereby granted, and that any lands that may have been so granted shall be strictly applied in accordance with the terms and conditions of said act or acts, unless subsequently modified by law. * * * *

Section 6. And be it further enacted, That the lands hereby and heretofore granted to said Territory or State of Minnesota shall be disposed of by said State for the purposes aforesaid only and in manner following, namely: when the Governor of said State shall certify to the Secretary of the Interior that any section of any ten consecutive miles of said road is completed, in a good, substantial and workmanlike manner, as a first class railroad, and the said Secretary shall be satisfied that said State has complied in good faith with the requirements, the said Secretary of the Interior shall issue to the said state patents for all the lands granted and selected as aforesaid, not exceeding ten sections per mile, situate opposite to and within a limit of twenty miles of the line of said section of road thus completed, extending along the whole length of said complet-

ed section of ten miles of road and no further. And when the Governor of said State shall certify to the Secretary of the Interior, and the Secretary shall be satisfied that another section of said road, ten consecutive miles in extent, connecting with the preceding section or with some other first class railroad, which may be at the time in successful operation, is completed as aforesaid, the said Secretary of the Interior shall issue to the said State patents for all lands granted and situated opposite to and within the limits of twenty miles of the line of said completed section of road or roads, and extending the length of said section and no further, not exceeding ten sections of land per mile for all that part of said road then completed under the provisions of this act and the act to which this is an amendment, and so from time to time until said roads and branches are completed.

And when the Governor of said State shall so certify, and the Secretary of the Interior shall be satisfied that the whole of any one of said roads and branches is completed in a good, substantial and workmanlike manner as a first class railroad, the said Secretary of the Interior shall issue to the said State patents to all the remaining land granted for and on account of said completed roads and branches, in this act, situate within limits of twenty miles from the line thereof, throughout the entire length of said road and branches: Provided, That no land shall be granted or conveyed to said State under the provisions

of this act on account of the construction of any railroad or part thereof that has been constructed under the provisions of any other act, at the date of the passage of this act and adopted as a part of the line of railroad provided for in this act: And provided, That nothing herein contained shall interfere with any existing rights acquired under any law of Congress heretofore enacted making grants of land to the State of Minnesota to aid in the construction of railroads: And provided, further, That said lands granted by this or prior acts, shall not in any manner be disposed of, except as the same are patented under the provisions of this act, and should the State fail to complete any one of said roads or branches within eight years after the passage of this act, then the said lands undisposed of as aforesaid granted on account of said road or branches shall revert to the United States. * * * *

Section 9. And be it further enacted, That the provisions of this act shall also be construed so as to apply and extend to that portion of the line authorized to be vacated by the joint resolution approved July twelfth eighteen hundred and sixty-two, entitled: "A joint resolution authorizing the State of Minnesota to change the line of certain branch railroads in said State and for other purposes," notwithstanding the vacation thereof by said State, as though said joint resolution had not passed, and also to the line adopted by said State in lieu of the portion of the line so vacated." * * * *

Act March 3, 1871.

An act authorizing the St. Paul and Pacific Railroad Company to change its lines in consideration of a relinquishment of lands. 16 Stat. 588.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled. That the St. Paul and Pacific Railroad Company may so alter its branch lines that, instead of constructing a road from Crow Wing to St. Vincent and from St. Cloud to the waters of Lake Superior it may locate and construct in lieu thereof a line from Crow Wing to Brainerd, to intersect with the Northern Pacific Railroad and from St. Cloud to a point of intersection with a line of the original grant at or near Otter Tail or Rush Lake, so as to form a more direct route to Saint Vincent, with the same proportional grant of lands to be taken in the same manner along said altered lines as is provided for the present lines by existing law: Provided, however, that this change shall in no manner enlarge said grant, and that this act shall only take effect upon condition that proper releases shall be made to the United States by said Company of all lands along such lines from Crow Wing to St. Vincent, and from St. Cloud to Lake Superior, and that upon the execution of said releases such lands so released shall be considered as immediately restored to market without further legislation.

Approved March 3, 1871.

Act March 3, 1887.

An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the Secretary of the Interior be and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted. * * * *

In pursuance of the directions expressed in the foregoing section one (1) of the last mentioned act of Congress, the Secretary of the Interior entered at once upon the work of adjusting the several railroad land grants still unadjusted in different parts of the country. In due course he reached the grant approved March 3, 1857, to aid in the construction of the road from Stillwater by way of St. Paul, and St. Anthony to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood River, with a branch from St. Anthony via St. Cloud and Crow Wing to the navigable waters of the Red River of the North, at such point as the Legislature of said Territory might select and after some preliminary steps the Secretary of the Interior issued to the Commissioner of the General Land Office the following

letter of instructions and directions adjusting the land grant made as aforesaid for the benefit of the main line and branch railroad last above described:

UNITED STATES OF AMERICA.
DEPARTMENT OF THE INTERIOR.

Washington, D. C., Dec. 30, 1910.

PURSUANT to Section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true and correct copy of the original as the same appears of record in this department.

IN TESTIMONY WHEREOF I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

(L. S.)

R. A. BALLINGER,
Secretary of the Interior.

852, '90
1516, '90
956, '91

Department Of The Interior,
Washington, D. C.,
June 10, 1891.

Address Only
The Secretary of the Interior.

St. Paul, Minneapolis & Manitoba, and the St. Paul, And Northern Pacific Railroad Companies.) Adjustment of grant.

The Commissioner of
The General Land Office.

Sir:—

With letter of January 25, 1890, was submitted by your office an adjustment of the land grant made to the then Territory of Minnesota by the act of March 3, 1857 (11 Stats., 195), and, after

the admission of the State, supplemented and amended by the Joint Resolution of July 12, 1862 (12 Stats., 624), the act of March 3, 1865 (13 Stats., 526), of March 3, 1871 (16 Stats., 588), and of June 22, 1874 (17 Stats., 203), in aid of a railroad "from Stillwater, by the way of St. Paul and St. Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via St. Cloud and Crow Wing to the navigable waters of the Red River of the North."

The adjustment follows the departmental decision in 8 L. D., 255, which directs that the grants for the main and branch lines of said road be adjusted as an entirety; and thus is found to be due, on account of said grants, 69,070.80 acres. With the adjustment were sent up for my approval list 10 for 56,667.10, and list 11 for 10,435.48 acres, and with a letter of February 14, 1890, was sent list 12 for 1,992.03 acres, aggregating 69,094.61 acres of land within the indemnity limits along the line of road between Watab and Crow Wing, and a slight excess over the amount shown to be due; which lists it is recommended be approved for the benefit of the St. Paul and Northern Pacific Railroad Company, the grantee of the State of Minnesota for that portion of the road.

It is stated in the letter of January 25, 1890, that the adjustment is made under the departmental decision of May 13, 1873 (Vol. 15, L. & R. p. 332), which holds that, in the matter of the conflict of lines between the St. Vincent's extension of said road and the Northern Pacific Railroad, near Glyndon, the rights of the first-mentioned company are superior to those of the latter.

Inasmuch as the Supreme Court has decided to the contrary in the recent case of the St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company (139 U. S., p. 1), it will be necessary to return said adjustment that the

same may be readjusted to accord with that decision.

In arriving at the above conclusion, the Supreme Court holds, in the decision cited, that at the date of the grant to the Northern Pacific Company in 1864, the St. Paul and Pacific Company had no grant from Crow Wing to St. Vincent, and that the grant made for this line by the act of March 3, 1865, *supra*, was a new grant, the route of which was subsequently authorized to be changed by the act of March 3, 1871, *supra*. It being thus decided by the highest judicial tribunal that the grant for the St. Vincent Extension, as it is called, is a new grant, made by acts of Congress subsequent in date to those by which the original grant was made for the main line to Breckenridge and the branch to Crow Wing, it seems that the decision of my predecessor, Secretary Vilas, in 8 L. D., *infra*, cannot be followed so far as to adjust the grant for the extension in connection with the other grants as an entirety. The earlier grants must be adjusted separately from the later one; and whenever it conflicts with the older grants, as at St. Cloud and perhaps elsewhere they will have priority of right. To this extent, I think, the decision of Secretary Vilas must be modified, and this modification would seem effectually to sever these grants as to preclude the right of indemnity selection by the older grants along the line of the younger grant, and *vice versa*.

Further than this, the rule laid down in that decision should not be disturbed; but the main line and branch as far as Crow Wing, taking their grants under the act of 1857, *supra*, should have the same adjusted as an entirety.

This ruling does not seem to be in conflict with the departmental decision in the case of the Grand Rapids and Indiana Railroad Company (10 L. D., 676), for there it was expressly held that the additional grant for the southward extension of

that road is but an amendment of the original grant; which the Supreme Court, in the case cited from 139 U. S., expressly decides the grant for the St. Vincent's Extension is not. In any event, it seems that this change is made necessary by the decision of the Supreme Court.

In your statement it is observed that the grant is charged with 28,800.65 acres of land within the primary limits as "vacant, except expired filings." Exactly what is meant by this item is not clearly understood. If the filing on said tracts expired prior to the date of definite location of the line of road, the lands should be patented to the company, unless it be shown they had not been abandoned. Northern Pacific R. R. Co., v. Stovenour, 10 L. D., 645-9. If, on the contrary it is meant that the filings existed at the date of definite location, and expired afterwards, the grant should be credited with the item, not charged therewith, and allowed indemnity for the lands thus lost. (Ib. 648.)

The charge of 14, 856.62 acres for land in the same limits, relinquished by the State, under its own act of March 1, 1877, which authorized the Governor to execute such relinquishments in favor of those who were settlers on such lands at that time, seems to be proper in aid of the adjustment of the grant.

The Supreme Court, in the case of the St. Paul Minneapolis and Manitoba Railway Company v. Greenalgh, 139 U. S., 19-22, pass upon this act, in connection with the act of Congress of March 3, 1874, *infra*, and hold that they are both valid, and that the company's contiued possession of the property, after the expiration of the time fixed for the completion of the road, was subject to the condition that the rights for settlers upon the lands at that time should not be interferred with. As the acts, last referred to, were passed and the settlements made after the definite location of the

road, it is proper to charge the lands in question to the grant, though, under the circumstances, the title to them is not to be passed to the company. This charge is a proper one, as indemnity is not to be allowed for said lands.

Deductions, aggregating 53,133.06 acres, on account of prior grants are made, under the provisions of section 3 of the act of March 3, 1865, *supra*, which provides that such deductions shall be made within the limits of the extension, and to the full quantity, of the grants made by said act. The prior grants, on account of which said deductions are made, are derived from the act of 1857, *supra*, under which several roads are entitled; and section 7 of the act of May 12, 1864 (13 Stats., 72) under which only one road is entitled, namely, the St. Paul and Sioux City, formerly the Minnesota Valley Road.

The act of 1865, *supra*, provided that the quantity of land granted to the State of Minnesota by the act of 1857, *supra*, to aid in the construction of the roads therein described, shall be increased to ten sections per mile, &c. As the construction of the St. Paul and Sioux City road was one of those provided for by the act of 1857, it might seem that road was also included in the increased grant made for all of said roads by the act of 1865. And so it would be, were it not for section 7 of the act of 1864, *supra*, which grants four additional sections per mile to that road. Congress having thereby made special provisions for said road, it is not reasonable to hold that it was intended to be also included in the general provisions of the act of 1865 nor should it be held that the latter act repealed the former by implication, when the two can thus be made to stand together. This construction is understood to be insisted upon by that company, and your adoption of it in the statement made is, I think, correct.

The correctness of the amount of some of the deductions made is questioned by the attorneys

for the St. Paul, Minneapolis and Manitoba Railway Company. Without passing upon this matter now, their brief is sent you that it may be considered in the new statement to be made.

As to the item of 2,577.27 acres described as "vacant," and that of 71,997.80 acres described as "selected," both in the granted limits it is assumed that they are composed of lands to which the grant is entitled, but are not yet in condition to be patented; otherwise the propriety of charging them against the grant for the purpose of making a final adjustment of the same, seems to be questionable and is not easily understood.

The allowance of lands to the Brainerd Branch as far north as Crow Wing, within the fifteen miles limit of the grant of 1857 and the primary limits of the Northern Pacific, under its grant of 1864, is in accordance with rulings of this department in the case of the Chicago, St. Paul, Minneapolis and Omaha Railway Company (6 L. D., 195), and of the Wisconsin Central Railroad Company in 10 L. D. 63; and of Mr. Justice Harlan in the case of the same company vs. Forsythe in 43 Federal Reporter, 867.

You state that 765.79 acres of the selected land in list 10 is covered by "old expired filings under which no one is asserting claim." It is assumed the filings expired before the selection by the company.

In the case of Allers vs. Northern Pacific Railroad Company, 9 L. D., 452, it was held (syllabus) that:

"An expired pre-emption filing, under which no claim is asserted does not exclude the land covered thereby from indemnity selection."

In the Stovenour case, before cited, it was said:

"Upon the expiration of the time limited by statute for the making of proof and payment, without such proof and payment having been made,

the presumption arose that whatever claim, or claims, had previously attached to the land, under or by reason of such filings, had been abandoned, and no longer in fact existed. This presumption, however, was not conclusive, but was open to rebuttal by any one claiming an interest in or right to the land, who might allege the contrary. The claimant, Stovenour, has made no such allegation in this case. So far as the records shows, the land in dispute was prima facie subject to the grant to the company at the date of the definite location of its road, and must be held, therefore, in the absence of any allegation or showing to the contrary, to have passed under the grant." (p. 649.)

The rule here laid down was enlarged by the requirement of notice, to the claimant, in the later case of the Little Rock and Memphis Railroad Company, 10 L. D., 595, where is was said (syllabus):

"No action should be taken on indemnity selections for land covered by expired filings until after notice to the claimants to assert any rights they may possess;"

The Allers case is not mentioned, but it is said:

"There is nothing in the Stovenour case to prevent this. While the rights under filings have ceased, settlement, if continued, would defeat the right of selection."

In the case of the Missouri, Kansas and Texas Railway Company 12 L. D., p. 88, the Little Rock and Memphis case was quoted and approved and you were directed to follow the rule there laid down.

In view, then, of these two later decisions, it is apparent that the tracts covered by expired filings ought not to have been included in the list until notice had been given "to the claimants" to assert any rights they may possess. You will therefore correct this error.

Examining the lists sent up for approval, it does not appear that the losses or selections are specified with sufficient detail to meet the requirements of the law and the rules of the Department.

The act of 1857, making the original grants to these roads, provides that where, at the time of the definite location, the United States have disposed of "any sections or any parts thereof," it shall be lawful to select in lieu thereof so much land "in alternate sections or parts of sections as shall be equal to the lands disposed of." A similar provision is found in most of the other railroad grants. The requirement of the law seems to be plain. The selection must be made tract for tract of the lost lands, not exceeding, however, in any case, an entire section. To make the selection properly in accordance with the rule, it is absolutely essential that the losses should be specified with particularity and the selections correspond therewith in quantity as nearly as legal subdivisions will permit.

If the loss is of an entire section, because, perhaps, of the swamp land grant, it will be lawful to select as indemnity therefore an entire section, or parts of a section, or sections, in one group; not exceeding in quantity the lost land. And so, in like manner, for the loss of any smaller quantity of land. Each loss, however, must be separately specified and the selection therefore designated. It is not proper to group losses on account of several claims, and make one selection to cover the lot, but the losses and seections should correspond to the extent of the claim, which caused the loss, not to exceed, however, in any specification of loss or selection of indemnity, the amount of one section. With lists thus prepared, I think the law and rules of the Department will be sufficiently complied with.

Herewith are returned said lists, and are also

sent the arguments of counsel filed in relation thereto.

Very respectfully,
(Signed) Geo. Chandler,
Acting Secretary.

After this letter of instructions had reached the Commissioner of the General Land Office, The St. Paul, Minneapolis and Manitoba Railway Company and the St. Paul and Northern Pacific Railway Company both requested a suspension of action, and that they be given an opportunity to be heard in oral argument against the principle and rules of adjustment laid down in the foregoing letter. The companies' request was granted and, in July, following briefs were filed and oral arguments before the said Secretary were made by counsel in behalf of each of said roads.

The Secretary took the whole matter under further advisement, with the aid of the briefs and the oral arguments made by counsel as aforesaid, and thereafter on October first, 1891, issued the following letter to the Commissioner of the General Land Office adhering to the rules and directions laid down in his letter of June 10, 1891.

SYLLABUS.

Letter of October, 1891.

In view of the provisions of the act of March 3, 1887, requiring the adjustment of railroad grants in accordance with decisions of the Supreme Court, and the recent decision of said Court as to the relation of the act of March 3, 1871, to the acts of

1857 and 1865, the Department must recede from its former ruling with respect to the adjustment of the Manitoba grant as an entirety.

The grant of the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba Railway is a new grant made by act of Congress subsequent in date to those by which the original grant was made for the main line, and it, therefore follows that the grant for said extension should not be adjusted in connection with the other grants as an entirety. The earlier grants must be adjusted separately from the later, and wherever the latter conflict with the older grant, priority of right must be accorded the prior grant.

The separate adjustment of the grants for the main and branch lines precludes the right of indemnity selection by the older grant along the line of the younger and vice versa.

The Department adheres to its ruling of June 10, 1891, and modifies the departmental decision in the case of the St. Paul, Minneapolis and Manitoba Railway Company (reported) 8 L. D., 255.

Secretary Noble to the Commissioner of the General Land Office Oct. 1, 1891. 13 L. D. 353.

"With your letter of January 25, 1890, was forwarded for my approval certain indemnity lists of selections by the St. Paul and Northern Pacific Railway Company and in said letter was presented an adjustment of the grants made by acts of March 3, 1857 (11 Stat. 195); March 3, 1865 (13 Stat. 526) and March 3, 1871, (16 Stat. 588) to the Territory and State of Minnesota to aid in the construction of a railroad "from Stillwater by way of St. Paul and St. Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via St. Cloud and

Crow Wing to the navigable waters of the Red River of the North." This adjustment proceeding under departmental decision 8 L. D. 255, recognized the grant of the main and branch lines of the Manitoba road as an entirety.

Subsequent to your letter, towit: March 2, 1891, the Supreme Court handed down an opinion in the case of the St. Paul and Pacific Railroad Company, vs. Northern Pacific Railroad Company (139 U. S. 1.) in which the grants under consideration were discussed, and in applying that decision to the adjustment it was held by me June 10, 1891: "It being thus decided by the highest judicial tribunal that the grant for the St. Vincent extension, as it is called, is a new grant made by act of Congress subsequent in date to those by which the original grant was made for the main line to Breckenridge and the branch to Crow Wing, it seems that the decision of my predecessor, Secretary Vilas, in 8 L. D., infra, cannot be followed so far as to adjust the grant for the extension in connection with the other grants as an entirety. The earlier grants must be adjusted separately from the later one; and whenever it conflicts with the older grants, as at St. Cloud and perhaps elsewhere, they will have priority of right. To this extent I think, the decision of Secretary Vilas must be modified and this modification would so effectually sever these grants as to preclude the right of indemnity selection by the older grants along the line of the younger and vice versa.

It was for the review in this, in the matter of the adjustment of its grant, that the Manitoba company requested a suspension of action thereunder, and that an opportunity be afforded it to present the matter orally, which was granted, the case being heard July 15, last.

A brief history of these grants is necessary to a proper understanding of the Matter now under consideration. The grant made by the act of March 3, (supra) was for a main line from Stillwater to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via St. Cloud and Crow Wing to St. Vincent, and was conferred upon the Minnesota and Pacific Railroad Company. In November, 1857, the Company located the branch line as far as Crow Wing, and in March, 1862, the State transferred the grant to the St. Paul and Pacific Railroad Company.

By joint resolution of July 12, 1862 (12 Stat. 624) a grant was made to the State of Minnesota for a new branch line having its southwestern terminous at any point on the existing line between the Falls of St. Anthony and Crow Wing and extending in a northeasterly direction to the waters of Lake Superior in lieu of that part of the original branch line, extending northwesterly from the intersection of the tenth (10) standard parallel with the fourth guide meridian.

By the ninth (9) section of act of March 3, 1865, (supra) which increased the grant made by act of

March 3, 1857 (Supra), from six alternate sections per mile on each side of the roads and branches to ten sections per mile, provision was made that said act should be so construed as to apply and extend to that part of the line authorized to be vacated by the joint resolution of July 12, 1862, (supra) as though said resolution had not been passed, and also to the line adopted by the state in lieu of that portion of the line vacated.

We now have two branch lines, one from St. Cloud via Crow Wing to St. Vincent, and another from some point on the line between the Falls of St. Anthony and Crow Wing to Lake Superior. By the act of March 3, 1871, (supra) the St. Paul and Pacific Railroad Company was authorized to alter its branch lines so that instead of constructing a road from Crow Wing to St. Vincent and from St. Cloud to the waters of Lake Superior, it might locate and construct in lieu thereof a line from Crow Wing to Brainerd to connect with the Northern Pacific Railroad, and from St. Cloud to a point of intersection with the line of the original grant at or near Otter Tail, or Rush Lake, so as to form a more direct route to St. Vincent, with the same proportional grant of lands to be taken in the same manner along said altered lines, as provided for the present lines by existing laws." Provision was also made for a relinquishment by the company of all lands along the abandoned lines from Crow Wing to St. Vincent and from St. Cloud to Lake Superior.

After the passage of this act there were yet two branch lines, the first comprising that portion of the original branch line as far north as Crow Wing with the extension authorized by this act to Brainerd; and the second, being an entire new line terminating as intended the original line should, at St. Vincent.

Of these the Manitoba Company claims the grant appertaining to the portion the first south of Watab and the entire new line to St. Vincent, while the St. Paul and Northern Pacific Company claims the grant for the line between Watab and Brainerd. Locations were made, under the act of March 3, 1871, which were accepted, and the roads have been constructed practically upon said lines.

It is now urged that in view of the decision of Secretary Chandler, in which it was held that under the act of March 3, 1857, the main and branch line were considered as one and the same road, and that the act of March 3, 1871, was an amendment of the act of March 3, 1857, and should be construed as though it were inserted in it, which decision was reaffirmed by Secretary Vilas, February 26, 1889 (8 L. D., 258), and declared to become a rule of property, it ought and cannot be overruled, unless very clearly shown to be wrong; further, that all that was meant by the court, in the case referred to, was that in respect to the time, when the grant of 1871 was to take effect as against an adverse railroad grant.

In answer to the first proposition, I have but to

refer to the act of March 3, 1887 (24 Stat. 556), which directs an immediate adjustment in accordance with the decisions of the Supreme Court, of all railroad land grants made by Congress, then unadjusted. There can be no question but that these grants came under that act, and it is but necessary to consider whether, under the decisions of the court, these grants are to be considered and adjusted as one or as separate grants.

In the case before referred to, the St. Paul and Pacific Railroad Company contended that the acts of March 3, 1865, and March 3, 1871, are to be treated, not as distinct acts, but simply as amendments to the act of March 3, 1857.

In answer to such contention the Court says: "The act of 1871 does not purport, in any sense to be an amendment of the act of 1857. It simply authorizes the St. Paul and Pacific Railroad Company to change its lines, in consideration of the relinquishment of certain lands. The old lines were to be given up and all the benefits attached to them, in consideration of which new lines were authorized, the old lines were not amended, but were abandoned. There was no partial release of the accompanying grants, but whatever right attended the original lines were to be surrendered." This language is very plain and cannot be misunderstood.

In the argument, both oral and by brief, counsel for these companies lay particular stress upon certain words used in the acts of 1871, viz: "may

alter its branch lines ****** with the same proportional grant of lands to be taken in the same manner along said altered lines as is provided for the present lines by existing laws. It is urged that lands are taken in the same manner as was provided by the then existing laws, when they are taken under and according to the conditions and limitations of the acts of 1857 and 1865, and that the altered ines consist of the portions located in pursuance of the act of 1871, together with the portions of the line originally contemplated, which were not affected by the alteration; hence it follows that they are taken along the altered lines, when they are taken anywhere along the line as finally located pursuant to the provisions of the acts of 1857, 1865 and 1871. This contention can not be sustained, in the light of the decision above referred to.

It will be remembered that the grant made by the acts of 1857 and 1865 were to the Territory and State of Minnesota and that lands were only to be disposed of in the manner as therein provided, under the direction of the State, who was to see that they were applied for the purpose intended. The act of 1865 provided for an issue of patents to the state as the road was constructed applying the coterminus principle.

The act of 1871 recognized the action of the State in confirming the grant upon the St. Paul and Pacific Company, and authorized the company to alter its lines, but that the grant for such altered

lines, (for which no previous grant had been made) was to be taken in the same manner as though the company had built and earned the grants for existing lines i. e. through the state and as the roads were constructed recognizing the coterminus principle. The amount of the grant was fixed by the words: "The same proportional grant of lands" and they were to be taken where? Along the altered lines i. e. the new or changed lines.

I am clearly of the opinion that the directions heretofore given for the adjustment of these grants and embodied in my letter to you of June tenth (10) last are correct and I have therefore to direct that you proceed without delay in this matter, as great interests are involved and demand immediate action.

Other questions are attempted to be raised by the St. Paul and Northern Pacific Company in the matter of certain deductions made in the adjustment before submitted by your office, but I prefer to leave same until the matter is again presented in accordance with directions herein given.

The Adjustment considered in the foregoing letters of June 10, and October 1, 1891, was made and completed in due course, under and in pursuance of the provisions of the act of Congress approved March 3, 1887, and in accordance with the decisions of the Supreme Court as in said act of Congress provided.

Neither the tract of land embraced in the Wass

claim, nor any of the odd numbered sections, within the indemnity limits of this branch line, applied for by the company in 1877, 1889 and in 1892, as before stated, was included in the lands awarded to the state for the benefit of the company entitled thereto, in the adjustment considered in the above letters of the Secretary of the Interior, for the reason that the State had, theretofore received patents for the full amount of lands granted in aid of the construction of the main line from Stillwater to Breckenridge, with its branch from St. Anthony to Crow Wing, the grant for which main line and branch were adjusted as an entirety.

The State was expressly inhibited from applying this grant or any part thereof to any other purpose, whatsoever, it is clear that when ten sections per mile, for the total mileage of the main line and branch, had been patented to the state for and on account of these lines, no more lands could be allowed in the adjustment. Hence all the odd numbered sections within the indemnity limits of this grant, south of Crow Wing, including the tract in the Wass claim, were properly excluded from the lists of lands awarded to the state for the benefit of the railroad company in the adjustment made as aforesaid.

As the odd numbered sections in the indemnity limits of this grant south of Crow Wing, including the Wass claim, were not in the aforesaid adjustment, awarded to the state for the benefit of such company as might be found to be entitled to them:

they were, intentionally excluded from such lists, and this exclusion from these lists was, in fact a rejection of the company's claim for the same, in their applications to select made in 1877, 1889 and in 1892 as aforesaid.

By this adjustment, therefore, the lands in question here, were disencumbered of any and all claims that might otherwise be made for them by the state or by any railroad company claiming under the state.

The tracts of land here in controversy, were in this disencumbered condition in 1899, when defendants settled upon, took possession of and applied to enter the same under the homestead law, as hereinbefore explained.

Subsequently and in February, 1903, the Department, at the solicitation of Plaintiff herein, took up the matter of this adjustment again; and in a decision reported in 32 Land Decisions, page 21, held that the former adjustment, made as aforesaid, in 1891, was erroneous in this respect; that the Department in making the adjustment in 1891, held that the branch line known as the St. Vincent Extension, as shown on the diagram opposite page two of this brief, was constructed under the provisions of a new grant rather than under the provisions of an amendment to the grant of March 3, 1857.

Upon this ground the former adjustment by Secretary Noble in his letter of June 10, 1891, and that of October 1 of the same year, reported in

13, L. D., 353, was recalled, reconsidered and so modified as to hold that the act of March 3, 1871, is an amendement of the act of 1857, and that the grant for the said St. Vincent Extension should be adjusted with the grant of 1857 as an entirety.

Owing to the reservations along the line of the St. Vincent Extension made in prior grants, for the benefit of other railroads, there seems not to have been land enough left within the primary limits and within the indemnity limits to supply the ten sections per mile which the company claimed under the grant of 1871. By being allowed to adjust as an entirety with the older lines to Breckenridge and to Crow Wing, this St. Vincent extension would absorb a large quantity of the lands patented to the state for the benefit of the older line and branch, and thus leave them enough short of the quantity granted, to enable the interested parties to still claim all the odd numbered sections along the branch line between Crow Wing and St. Cloud.

In their desire to get these remaining lands along the Crow Wing branch the railroad company overlooks, or ignores, the fact that all of the lands along the St. Vincent Extension, covered by former grants, were excepted from the operation of the grant of March 3, 1871, and that the company was not entitled to indemnity for lands covered by prior grants, or for lands not in place within their granted limits.

As to whether or not the act of March 3, 1871,

is a new and independent grant or merely an amendment of the act of March 3, 1857, has been considered by this Court in the case of St. Paul and Pacific Railroad Company vs. Northern Pacific Railroad Company reported in 139 U. S. 1, and in an exhaustive opinion handed down by Mr. Justice Field, in March, 1891, the act of March 3, 1871, is held to be a new grant subsequent in date to July 2, 1864, and therefore, subsequent to March 3, 1857.

In the opinion referred to 139 U. S. 1, Justice Field says:

> "The act of March 3, 1865, as said above, is a new Grant, referring to but distinguishable and distinct from, that made by act of March 3, 1857. The act of March 3, 1871, only authorizes the construction of different lines from those previously designated, in consideration of the relinquishment of lands along the previously designated lines, the new lines to have the same proportional grant along them to be taken in the same manner as along the former lines. These two acts are subsequent in date to the act under which the plaintiff claims, and the rule has long been settled that where different grants cover the same premises the earlier takes the title. There would be no reason why that rule should not be followed in the present case, if the act of March 3, 1871, should be held to cover the premises in controversy.
>
> "It is, however, contended in answer to this position of an earlier grant to the plaintiff, that the acts of March 3 1865, and March 3, 1871, are to be treated, not as distinct acts, but simply as amendments to the act of March 3,

1857, and to be given operation as of that date. We do not assent to this position. Though the act of March 3, 1865, by its new and additional grants amended, the previous act of 1857, its operation upon any lands previously reserved to aid in any work of internal improvement was expressly restrained. What was reserved before remained reserved afterwards. And the act of 1871 does not purport, in any sense, to be an amendment of the act of 1857. It simply authorizes the St. Paul and Pacific Railroad Company to change its lines in consideration of the relinquishment of certain lands. The old lines were to be given up, and all the benefits attached thereto, in consideration of which new lines were authorized The old lines were not amended, but were abandoned. There was no partial release of the accompanying grants, but whatever rights attended the original lines were to be surrendered."

The adjustment of these several grants made by the department, as above stated in 1891, seems to be fully supported by this decision above cited, and should not be disturbed except for the strongest and clearest reasons.

In the subsequent adjustment made by the Department in February, 1903, we find no authority cited except the decision of Secretary Vilas, rendered in 1889, some two years before this Court handed down the decision above cited in 139 U. S. 1. And the Vilas ruling could not be considered authority after this Court had decided the same point otherwise. Therefore the latter adjustment seems to have been made without authority of law. Neither can we discover any reason for this later

adjustment other than that the Department believed that the Court did not mean what its language clearly expressed, when it says that the act of 1871 is not an amendment, but is a new grant.

I can not hope to add anything to what has been said by the Court and by Secretary Noble on the points in issue here, and in leaving this phase of the question we ask the attention of the Court especially to the

Two letters of Secretary Noble herein quoted, the one of June 10, is certified because it was not published in the reports, and the other of October 1, 1891, is reported in 13, Land Decisions, 353.,

Also to the letter of Secretary Hitchcock of date February 1903, and published in Land Decisions 32, page 21.

And to the decision of this Court above referred, 139, U. S. 1.

We believe that the best evidence in support of our views, in this matter, is to be found in reported decisions heretofore rendered by this Court, and, therefore, we beg leave, at this time, to quote from a few leading cases in point.

The Court said: In the case of *Ryan vs. Central Pacific Railroad Company; 99 U. S. 382; Decided* 1879:

> "Under the statute when the road was located and the maps were made, the right of the Company to the odd sections first named became, ipso facto, fixed and absolute. With respect to the "lieu lands, as they are called, the *right was only a float* and *attached* to *no*

particular tracts, until the selections were actually made *in the manner prescribed.*

In the case of *Cedar Rapids, etc., Railroad Company vs. Herring* 110 *U. S.* 27. Decided in 1884.

> "It is obvious, however, that the right to these odd sections and the right to others, in lieu of such odd sections as have been previously disposed of, depend on very different circumstances, and it is not easy to see how rights could be vested in any particular section or sections of the latter class, until it is ascertained how many of the original odd numbered sections are thus lost, and until the grantee has exercised his right of selection. The latter unlike the odd numbers, within the six mile limit, are not ascertained and made specific by the protraction of the established line through the map of the public lands. They are not and cannot be made specific until the grantee's right of selection has been exercised. This Court, in construing the same clause of the grant to the California and Oregon Railroad Company 14 Statute at Large 239 said: "When the road was located and the maps were made the right of the Company to the odd sections first named became fixed and absolute. With respect to the "lieu lands," as they are called, the right was only a float, and attached to no particular tracts, until the selection was made *in the manner prescribed.*"

Kansas Pacific Railroad Company vs. Atchinson, Topeka and Sante Fe Railroad Company. 112 *U. S.* 414, decided in 1884:

> "The question, therefore, for determination is, whether the grant to Kansas by Act of Congress of March 3, 1863, covered the title to these idemnity lands. We are clear that it did not. It granted only alternate sections

designated by odd numbers, within the limit of ten miles, and from them certain portions were to be excepted. For what were thus excepted, other lands, were to be selected from adjacent lands, if any there remained to which no other valid claims originated. But what unappropriated lands would thus be found and selected could not be known before actual selection. A right to select them within certain limits, in case of a deficiency within the ten mile limit, was alone conferred, not a right to any specific land, or lands capable of identification by any principle of law or rules of measurement; neither locality nor quantity is given from which such lands could be ascertained. If, therefore, when such selections were to be made, the land from which the deficiency was to be supplied had been appropriated by Congress to other purposes, the right of selection became a barren right, for until selection was made the title remained in the government subject to be disposed of at its pleasure."

St. Paul and Sioux City Railroad Company vs. Winona and St. Peter Railroad Company 112 *U. S.* 720 decided in 1884:

"The reason for this is that no vested right can attach to land in place, the odd numbered sections within six miles of each side of the road, until these sections are ascertained and identified by a legal location of the line of road, so in regard to the lands to be selected within a still larger limit, their identification can not be known until the selection is made. It may be a long time after the line of road is located before it is ascertained how many sections or parts of sections within the primary limits have been lost by sale or pre-emption. It may be still longer before selection is made

to supply the loss. The plaintiff in error insists, that the map of its line of road was filed in 1859. The Court of original jurisdiction finds that up to the time of trial in October, 1878, a period of nearly twenty years, no selection of these lands had ever been made by the company or by anyone for it. Was there a vested right in this company during all of this time to have not only these lands, but all the odd numbered sections within the twenty mile limit, on each side of the line of road await its pleasure? Had the settlers in that populous region no right to buy of the government, because the company might choose to take them, or might after all that delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation and forbidden to cultivation?"

Barney vs. Winona and St. Peter Railroad Company, 117 *U. S.*, 228., *Decided* 1886.

"In the construction of land grant acts in aid of railroads, there is a well established distinction observed between "granted lands" and "indemnity lands." The former are those falling within the limits especially designated and the title in which attaches, when the lands are located by an approved and accepted survey of the line of the road, filed in the Land Department, as of the date of the act of Congress. The latter are those lands selected in lieu of parcels lost by previous dispositions and reservation for other purposes and the title of which accures only from the time of their selection."

Sioux City and St. Paul Railroad Company vs. Chicago, Milwaukee and St. Paul Railway Company, 117 *U. S.*, 406, *Decided* 1886:

"In the opinion above referred to it was held that while this rule applied to what are called lands in place, that is, those odd sections found within ten miles limit of the road, as those ten miles conflict with each other, it did not apply to lieu lands or indemnity lands which were to be selected outside of the ten mile limit. The reason of this was said to be that, with regard to the odd sections found within the original limits of the grant undisposed of when the line of road was definitely located, that location ascertained the sections which passed by the grant and fixed the right to such sections whether it was the whole or the moiety of them. But no title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained and the selection made, approved by the Secretary of the Interior."

Wisconsin Central Railroad Company vs. Price County et al, 133 *U. S.* 496, decided 1890

"But as to the remainder of the lands taxed, which fell within the indemnity limits, the case is different. For such lands no title could pass to the company, not only until the selections were made by the agents of the state appointed by the Governor, but until such selections were approved by the Secretary of the Interior. But that officer never approved of them, nor can such approval be inferred from his not formally rejecting them. "The approval of the Secretary was essential to the efficacy of the selections and to give to the company any title to the land selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiences in the land granted to the company, which were to be supplied from indemnity

lands, and, in the second place, whether the particular lands selected could be properly taken for those deficiences. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead right had attached before the line of the road was definitely fixed. There could be no idemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated and what portion still remained. "Until the selections were approved, there were no selections, in fact, only preliminary proceedings taken for that purpose, and the indemnity lands remained unaffected in their title. Until then the lands which might have been taken as indemnity were incapable of identification, the proposed selections remained the property of the United States.

The government was indeed, under promise to give the company indemnity lands in lieu what might be lost by the cases mentioned. But such promise passed no title, and, until it was executed, created no legal interest that could be enforced in the courts."

After referring to some former decisions involving indemnity land questions, the court concludes this Wisconsin Central case by saying:

"THE UNIFORM LANGUAGE IS, THAT NO INDEMNITY LANDS BECOME VES-

TED IN ANY COMPANY OR IN THE STATE UNTIL THE SELECTIONS ARE MADE; AND THEY ARE NOT CONSIDERED AS MADE UNTIL THEY HAVE BEEN APPROVED, AS PROVIDED BY STATUTE, BY THE SECRETARY OF THE INTERIOR."

United States vs. Missouri, Kansas and Texas Railway Company, 141 *U. S.* 358, decided 1891:

> "We say prior to such selection and approval, because as to lands which may be legally taken for purposes of indemnity, the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted, but in the fullest legal sense remains in the United States until they are actually selected and set apart, under the direction of the Secretary of the Interior especially for indemnity purposes.

New Orleans Pacific Railway Company vs. Parker 143 *U. S.* 42, decided 1892:

> "Now it has long been settled that while a railroad company, after its definite location acquires an interest in the odd numbered sectoins within its place or granted limits, which interest relates back to the granting act, the rule is otherwise as to the lands within the indemnity limits. As to lands of the latter class, the company acquires no interest in any specific section until a selection is made with the approval of the Land Department.
>
> "Having regard to the adjudicatal cases it is to be taken as established that unless otherwise expressly declared by congress, no right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction of the Secretary of the Interior."

Humbird vs. Avery, 195 *U. S.* 480, Decided 1904:

"This conclusion is fortified, if not absolutely demanded by another consideration, namely, that no title to indemnity lands is vested until a selection be made by which they are definitely ascertained and the selection made approved by the Secretary of the Interior. This principle is firmly established. A full statement of it is found in the *Wisconsin Central Railroad Company vs. Price County*, 133 *U. S.* 496.

Sjoli vs. Dreschel, 199 *U. S.*, 564, decided 1905.

"That the railroad company will not acquire a vested interest in particular lands, within or without the place limits, merely by filing a map of general route and having it approved by the Secretary of the Interior, although, upon the definite location of its line of road, and the filing and acceptance of a map thereof in the office of the Commissioner of the General Land Office, the lands within the primary, or place limits not theretofore reserved, sold, granted or otherwise disposed of, and free from pre-emption or other claims or rights, became segregated from the public domain, and no rights in such place lands will attach in favor of a settler or occupant, who became such after definite location;

"That no rights to lands within indemnity limits will attach in favor of the railroad company until after selection made by it with the approval of the Secretary of the Interior."

"That up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws of the United States," and

"That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits, which have not been previously selected, with his approval to supply deficiencies within the place limits of the company's road." * * *

"The company's unapproved selections did not therefore, stand in the way of the lands being occupied and entered under the homestead laws. The mere filing of its lists of selections of indemnity lands did not have the effect to exclude them from occupancy under the pre-emption and homestead laws. On the contrary, notwithstanding the filing of such lists, they remain open as before, to settlement or occupancy under those laws until the seleections were formally *approved* by the Secselections were formally approved by the Secretary of the Interior and the lands withdrawn from settlement or sale."

In the late case of *Brandon vs. Ard*, 211 *US*. 11, decided in 1908, after reviewing the facts of the case, the court refers to, quotes from at length, and follows, as the law of the case, the doctrine announced in the Sjoli case, thus saying to the profession and to the public, that the rules laid down in that case were general in their application, wherever there are conflicting claims between an individual entryman and a railroad company for lands within its indemnity limits.

On the authority of all these cases hereinbefore referred to we assert that the rule laid down so clearly in the Sjoli case, also governs and disposes of the case at bar.

It is irrelevant that Sjoli settled upon his claim

in 1884, and prior to the company's application to select it, in 1885, since he did not apply to enter it as a homestead or otherwise, until 1889, four years after the company's application.

It is well settled that an individual entryman acquires no interest in lands as against a railroad company by mere occupancy, or until he has made application to the proper local land office to enter his claim under some one or other of the public land laws.

Kansas Pacific Railroad Company vs. Dunmeyer, 113 *U. S.*, 629;

Hastings and Dakota Railroad Company vs. Whitney, 132 *U. S.*, 357;

Whitney vs. Taylor, 158 *U. S.*, 85;

Northern Pacific Railroad vs Colburn, 164 *U. S.*, 383;

Northern Pacific Railroad Company vs Sanders, 166 *U. S.*, 620;

Tarpey vs. Madsen, 178 *U. S.*, 214.

In the Tarpey case last above cited, the Court says:

> "Oral evidence, therefore, of the date of occupancy, may be decisive of the controversy between such individual applicants for a tract of public land, but by decisions of this Court running back to 1882, as between a railroad company holding a land grant and an individual entryman, the question of right has been declared to rest, not on the mere matter of occupancy, but upon the state of the record."
>
> "Recapitulating, we are of opinion that a

> proper interpretation of the acts of congress making railroad grants like the one in question, requires that the relative rights of the company and an individual entryman must be determined, not by the act of the company in itself, fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence on the one part, the filing of the map in the office of the Secretary of the Interior, and, on the other the declaration and entry in the local land office. In this way, matters resting on oral testimony are eliminated, a certainty and definiteness is given to the rights of each, the grant becomes fixed and definite, and, while as repeatedly held, the railroad company may not question the validity and propriety of the entryman's claim of record, its rights ought not to be defeated * * * by fugitive and uncertain testimony of occupation."

The railroad company acquired no interest in the land claimed by Sjoli, by reason of their application to select it made in 1885, because that application had not been approved by the Secretary of the Interior.

This is the theory acted upon by the Land Department, when they allowed Sjoli's entry accepted his final proof and passed his claim to patent, and it is the theory acted upon by this Court when they upheld his claim for the land.

Under the decisions hereinbefore cited, we repeat Sjoli's occupancy of his claim prior to the company's application to select it in 1885, is irrelevant and immaterial. It gave him no right as against the company since he had not then applied to enter it under any one of the public land laws,

and, at the same time, the railroad company's applications made as above stated gave them no right since it was not approved as required by law.

Accordingly, when Sjoli applied to enter his claim in 1889, it was in the very same condition, so far as the rights of the company were concerned, as was the land in the case at bar, when Fred Wass made his homestead application for it in 1899.

If it be said that the Secretary of the Interior never approved the Wass application to enter the land, we must admit that the said Secretary did err in this case and that he interpreted the law correctly in the Sjoli case.

Since Sjoli had not made his application to enter the land, when the company applied to select it in 1885; under the decision in the Tarpey vs. Madsen case, Supra, it was not distinguished in any respect from the status of the land in the Wass case, when he applied for homestead entry in 1899.

The Wass case and the Sjoli case, therefore, were both alike, and in the same status, when each of the entrymen made his application at the local land office to initiate his claim; as the Secretary's erroneous approval of the company's application to select the land in the Wass case, was a mere nullity. That is, in other words, we may say, truthfully, that the Secretary of the Interior never approved the company's application to select the land in the Wass case, as required by law. Had this Wass case received the careful attention

it was entitled to, when in the Land Department for adjustment, it would have appeared, as in the Sjoli case, that a homestead right had already attached to the land, and that, therefore, it was not then subject to selection or to approval as indemnity land.

Since the Sjoli case and the Wass case are alike in all material respects, we insist that the decision in the Sjoli case should dispose of the Wass case also.

III.

The common law fiction of relation does not apply in the case at bar.

The best answer to the contention that the common law fiction of relation applies in this case, so as to make the Secretary's approval, in 1905, relate back and make the selections valid as if the date of the applications in 1892; is found in the Sjoli case, Supra.

> "The company's unapproved selections did not, therefore, stand in the way of the lands being occupied and entered under the homestead law. On the contrary, notwithstanding the filing of such lists, they remained open, as before, to settlement, or occupancy under those laws, until the selections were formally approved by the Secretary of the Interior, and the lands withdrawn from settlement and sale."

As hereinbefore shown, the rule in the Sjoli case is announced in a number of other cases including:

Kansas Pacific R. R. Co. vs. Atchinson R. R. Co., 112 *U. S.*, 414;

United States vs. Missouri K. & T. R. R. Co., 141 *U. S.*, 358.

Oregon and California R. R. Co., vs. United States, 189 *U. S.*, 100;

Wisconsin Central Railroad Co., vs. Price Co., 133 *U. S.*, 496;

Humbird vs. Avery, 195 *U. S.*, 480;

Brandon vs. Ard, 211 *U. S.*, 11.

Directly in point, also, is the case of Flint and Pere Marquette Railway Company vs. Gordon, 41, Michigan 420, in which case Judge Thomas M. Cooley, speaking for the court, said:

> "That doctrine is remedial, and is used in the law to prevent wrong and punish trespass. As has been repeatedly declared in this Court, it can never be so applied, as to make that wrong which was innocent when done, or so as to divest rights, which, by sanction of law, have been acquired since the time from which the relation dates."

In construing a land grant, and in construing the homestead law, the will and intention of Congress, not common law fictions, must be kept in view.

Missouri, Kansas & Texas R. R. Co., vs. Kansas Pacific R. R. Co., 97, *U. S.*, 491.

United States vs. Southern Pacific Railroad Co., 146 *U. S.*, 570;

Wisconsin Central R. R. Co., vs. Forsyth, 159 *U. S.*, 46.

In the case of the Missouri, Kansas and Texas Company, Supra, the Court declares:

> "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made, is a law as well as a conveyance, and that such effect must be given it, as will carry out the intent of congress That intent should not be defeated by applying to the result the rules of the common law, which are properly applicable only to transfer between private parties. To the validity of such transfer it may be admitted that there must exist a present power of identification of the land, and that where no such power exists, instruments, with words of present grant, are operative, if at all, as contracts to convey, but the rules of the common law must yield in this, as in all other respects, to the legislative will."

The will of congress, then, as interpreted by the Courts, is the thing to be kept in view in determining this matter. The intent of congress, in all of its acts dealing with the public lands, has been to give a preference right to the individual settler. This intent is seen in the preemption laws, it is seen in the homestead laws, and it is seen in each and every of the several congressional acts, granting public lands in aid of the construction of railroads.

In the preemption and in the homestead laws the intention of Congress is obvious and needs no exposition. In the railroad land grants, care has been taken to expressly except from the operation of the grant, all those tracts within the primary limits, occupied by settlers claiming under the preemption

and homestead laws, prior to the definite location of the line of road.

Since Congress excepted from the operation of the grant all tracts thus occupied and claimed within the primary limits, it is reasonable to assume that they would not change the rule within the indemnity limits, where the lands were not granted to the Company.

Had it been practicable for Congress to have kept the administration of the indemnity provisions of the land grant in its own hands, there can be no doubt, that the settler upon odd numbered sections, claiming under the homestead law, prior to their selection by the Company, in the manner prescribed, would have been given, like those in the place limits, a prior right as against the Company, and it is a reasonable inference that in delegating authority to the Secretary of the Interior to act for them, they would have him carry out their intention in that respect.

That the intention of Congress is and always has been, to give the actual settlers upon public lands a prior and superior right over other persons or paties, has been frequently declared by the Court.

In the case of *Clements vs. Warner*, 65 *U. S.*, 394, the Court said:

> "The policy of the Federal Government, in favor of settlers upon public lands, has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land comprehending their improvements, over that of any other person."

This decision rendered in the year 1861, before the enactment of the homestead law, and relating to a preemption claim, speaks of the settler's superior equity to purchase a limited extent of land as a home. But in the subsequent case of *Ard vs. Brandon*, 156 *U. S.*, 537, involving the right of a homestead entry, after declaring that the law deals tenderly, with one, who, in good faith, goes upon public land, with a view of making a home thereon, the Court adopts and incorporates, into the Ard vs. Brandon decision, the above citation from the case of Clements vs. Warner.

The case of *Clements vs. Warner* and that of *Ard vs. Brandon* are referred to approvingly by the Court in the later case of

Northern Pacific Railroad Company vs. Amacker, 175 *U. S.*, 563, and in the case of *Tarpey vs. Madsen*, 178 *U .S.*, 214, thus showing that, after its long and varied experience in dealing with this class of cases, the Court holds as well settled, the principle that the intent of Congress is, and always has been, to give the actual settlers upon public land and, in good faith, claiming for himself a home, a prior and superior right over any other person or party. And this, it seems to us, ought to settle, against the contention of the Company, their claim to the land in suit, under or by virtue of the aforesaid fiction of relation.

The case of *Shepley vs. Cowan*, 91 *U. S.*, 330, is cited by opposing counsel as a case in point illustrating the operation of the fiction of Relation, in

cases similar to the case at bar. But an examination of that case will reveal the fact (1) that the Shepley case is not similar to the case at bar, and (2) that the decision in that case rests upon the act of Congress approved March 3, 1853, 10 Stat. at L. 244, Chap. 143, rather than upon the aforesaid *fiction of relation*

The land in question in the Shepley case was embraced in the confirmed French grant made to the Village of Carondelet before the date of the Louisiana Purchase. As such confirmed French grant it was not a part of the public domain in 1835, when the individual claimant offered his preemption filing, or in 1849, when the State of Missouri selected it on account of its swamp land grant.

In 1862, this Court held the French grant invalid so far as the Shepley claim was concerned, and, owing to the facts in the case, the tract fell under the operation of the act of March 3, 1853, above cited and the relevant part of which reads as follows:

> "And provided further, that any settler who has settled or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish or other grants, which have been or shall be hereafter declared by the Supreme Court of the United States, to be invalid, shall be entitled to all the rights of preemption granted by this act, and the act of fourth of September, eighteen hundred and forty one entitled 'An act to appropriate the proceeds of the public lands and to grant pre-

> emption rights,' after the lands shall have been released from reservation, in the same manner as if no reservation existed."

After the land in the Shepley claim had been released from the reservation by a decision of this Court, the heirs of Chartrand, claimed and secured the land under the act of Congress, and the fiction of relation was not needed in the decision of the case.

Selections by the state on account of its swamp land grant, the filing of a preemption statement by an individual, the making of a homestead entry by a qualified claimant, and the filing of the map of the definite location of its line of road, by a railroad company, all rest upon the same authority, an act of Congress, and all fall under the operation of the same rule, as to the attachment of right and the vesting of title.

In neither of these cases does the attachment of right or the vesting of title depend upon the action of the Secretary of the Interior, or upon the action of any other officer of the Land Department; but the attachment of such right and the vesting of such title springs directly out of the act of Congress, in pursuance of which the claim is made, when followed up by a compliance with the provisions of such act.

In such cases the initiatory steps taken by the claimant, when followed by a compliance with the law, extends forward and requires, not a title, for the claimant has that, but record evidence of title.

The only service the officers of the Land Department can render in such cases is to mark upon their records the description of such tracts of land as were designated and made certain by the state selection, the preemption filing, the homestead application, or the railroad map of definite location, and to issue as record evidence of title, such lists, certificates, or patents as are usual in such cases.

What I mean to say here is that the action of the Secretary is not discretionary in any of these four cases, he has only ministerial work to perform, and his action does not relate back in any way to affect the attachment of right or the vesting of title. These are controlled exclusively by the act of Congress and the action of the claimant.

Therefore it is true that, when a state swamp land grant selection and a preemption filing for the same tract of land are in conflict as in the case of Shepley vs. Cowan, that one which is first in time is first in right.

The act of March 3, 1853, granted the heirs of Chartrand a prior right on account of the settlement and declaration of their ancestor, in 1835. That act of Congress, and not the fiction of relation, decided the case in their favor.

In the case at bar the claim of the settler and the claim of the Company have not a common origin. The settler takes directly under the act of Congress, the homestead law, while the Company takes, if at all, under the act of the Secretary of

the Interior, in pursuance of the indemnity provisions of the grant.

The settler having occupied the land and applied to enter it as a homestead in the year 1899, his right attached and his title vested as of that year, and, having been followed up with a full compliance with the law, his right and title so initiated, reaches forward and requires the issue of a patent in his favor, after the expiration of five years, unless the land was previously embraced in some superior valid claim.

The Company's unapproved selection lists is all that stood in the way of the allowance and approval of the Wass entry. As we understand the law and the ruling of the Court, the Company gained no right by merely filing its lists of applications, nor could any right attach in favor of the Company until the lists were approved by the Secretary of the Interior.

In the case at bar the approval of the Secretary was not given until the month of February, 1905, which was more than five years after the right of the settler had attached and the title had vested in Fred Wass, under the operation of the homestead law.

If the rule "first in time, first in right," is sound in law, as argued by opposing counsel, then there can be no doubt that the settler, Fred Wass, holds the land under that rule.

It is not an answer to this to say that we are taking for granted the very point in issue, or that

we are begging the question, since the rule we are contending for and relying upon here, which is that lands, within the indemnity limit, were never granted to the Company or to the state by Congress, and that the only right that can attach to such lands in favor of the Company, originates, not in the act of Congress, not in the act of the Company, but in the act of the Secretary of the Interior, has been repeatedly declared by this Court, as we understand the language of the decisions hereinbefore cited.

From all of which it appears that the case of Shepley vs. Cowan is not in point, and that the doctrine of relation cannot apply to the case at bar.

The case of *McCreery vs. Haskell*, 119, *U. S.*, 327, is also cited in support of the contention that the doctrine of relation applies in such cases as the one at bar. But this decision was rendered under the provisions of an act of Congress approved July 23, 1866, for the quieting of land tites in California; 14 Stat. at L. 218; Section 6, of which reads as foilows:

> "And be it further enacted that an act entitled "an act to provide for the survey of public lands in California, the granting of preemption rights and for other purposes" approved March 3, one thousand, eight hundred and fifty-three, shall be so construed as giving the State of California the right to select for school purposes, other lands in lieu of such sixteenth and thirtysixth sections as were * * * covered by grants made under Spanish

> and Mexican authority * * * or where such sections would be so covered if the lines of the public survey were extended over such lands, which shall be determined * * * in case of Spanish or Mexican grants, when final survey of such grant shall have been made. The surveyor general for the State of California shall furnish the state authorities with lists of such sections so covered, as a basis of selection, such selection to be made from surveyed lands, and within the same land district as the section for which the selection is made."

It appeared upon the plat of the survey made under the direction of, and approved by the surveyor general for the State of California, and filed in the District Land Office at San Francisco, that section sixteen and thirty-six of the township, were embraced in the confirmed Mexican grant known as "Sausal Redondo Rancho," were set off to the grantee in pursuance to the act of Congress above mentioned, were thus lost to the state from its grant for school purposes, and were thus officially designated as a proper basis for the selection of lieu land to the extent of these two sections.

It appears also that, after the surveyor general for the State of California, had furnished the state authorities, lists showing sections sixteen and thirty-six of the township covered by a confirmed Mexican grant, and set off to the grantee as required by law, the state, on the 22nd of April, 1868, selected, in part satisfaction of the loss in section sixteen the tract of land afterwards settled upon and claimed by McCreery under the preemption law.

The land thus selected by the state was public land, within the same land district as the section lost, and entirely free from all other claims or rights at the date of the selection as above mentioned. This selection in behalf of the state was made more than a year and a half before McCreery settled upon the land or otherwise attempted to initiate his claim thereto under the preemption law.

The right of the state to make this selection and the right of the individual to take the land under the preemption law have a common origin. They each rest upon an act of Congress and neither of them is dependent upon the action or the discretion of the Secretary of the Interior. When followed up by a compliance with the provisions of the act under which it is made the selection of the state or the filing of the individual, *whichever* is *first* in *time* is *first in right*, *reaches* forward to the fulfillment of the law, and requires, as a right, from the proper officers of the Land Department, record evidence of the descriptions of the land, in which their right has attached and their title vested under the act of Congress.

Wright vs. Roseberry, 121 *U. S.*, 488.

Since, then, the officers of the Land Department had no discretion to exercise in the McCreery case and rendered therein only ministerial service, it is idle to say that their action relates back in any direction, any distance, or for any purpose.

In the case at bar the settler takes under the act of Congress, the Company under that of the Secre-

tary, and the case of McCreery is far from being in point.

Neither is the case of Campbell vs. Doe, 13 *How.*, 244, in point. In that case the Secretary of the Treasury, under whose jurisdiction such matters then were, had authorized and directed the selection of this land for school purposes, before Campbell was inadvertantly allowed to enter it. And, therefore, the selection for the state was first in time.

Other cases cited to support the fiction of relation are widely distinguished from the case at bar.

In the case of *Gertgens vs. O'Connor*, 191 *U. S.*, 237, the settlement of Gertgens upon the land was made after the approval of the act of Congress of March 3, 1887 (24 Stat. 556) and as this statute expressly provides that, in case the land in dispute is not of the class that may be lawfully patented to the railroad company, then the party having contracted to purchase it from the railroad company, shall have a prior right to purchase it upon the terms and conditions stated in said act of March 3, 1887. The right of such purchaser, therefore, attached immediately and directly under this act of Congress. And the Fiction of relation has nothing to do in that case.

In the case of the*United States vs. Anderson*, 194, *U. S.*, 394, the action was brought to recover damages for a trespass committed upon the land in question by the removal therefrom of a considerable quantity of iron ore and valuable limestone

rock. And damages for tresspass in cutting and carrying away valuable timber, was the cause of the action in the case of *Musser vs. McRal*, 44 *Minn.*, 343.

Neither of the two cases last above mentioned is similar to the case at bar; and each of them is so widely distinguished from it as to need no further attention from us.

In such search as we have been able to make, we have been unable to find in the reports of this court, any case similar to the one at bar, where the land has been awarded to the Company, and the claim of the settler rejected under the operation of the fiction of relation. And, since no such case has been cited by opposing counsel, the inference is very strong, that there is no such case in the reports.

In arguing the case thus far, no attention has been given to the decisions of the United States Land Department, for the reason that those decisions are not in harmony with the decisions of this Court; they are not always in harmony with each other, and in so far as they are in conflict with the Court decisions cited in support of this defendant's case here at bar, they are without weight and properly disregarded.

IV.

Defendant's right to possession of this land is in no way affected by the refusal of the Register

and Receiver of the local United States Land Office to approve and allow application when it was prevented as aforesaid, in 1899.

Ard vs. Brandon, 156, *U. S.*, 537;

Shepley vs. Cowan, 91, *U. S.*, 330;

Frisbie vs. Whitney, 76, *U. S.*, 187;

Syttle vs. Arkansas, 9 *How.*, 314;

Wirth vs. Branson, 98, *U. S.*, 118;

Stark vs. Stark, 6, *Wall.*, 402.

It appears, from an examination of the authorities cited in the foregoing pages, that the land in suit, was not granted to the Territory or to the subsequent State of Minnesota to aid in the construction of railroads or for any other purpose whatever. Nor does it appear to have been reseved for the benefit of any railroad company by the indemnity provisions of the land grant in question. It was open, therefore, to occupancy and entry under the homestead law, when Wass applied for it, at the local land office in 1899, and the presentation of his application operated to segregate his claim from the public domain, so that, thereafter, it was not open to selection or to approval as indemnity land.

Fred Wass is claiming the land in issue, under the homestead law, and by virtue of his compliance in all respects with the provisions of the same.

His qualifications, good faith and compliance with the law are not disputed or questioned in the pleadings, but are fully admitted by the filing of

a demurer to his answer in the trial Court as exhibited in the record.

Accordingly we ask that the order and decree of the Supreme Court of the State of Minnesota be affirmed in all respects, and that the prayer of defendants in their answer made, be granted and allowed.

From the authorities examined in the preparation of this case it seems well settled that lands within the indemnity limits of a railroad land grant are open to occupancy and entry under the homestead law until the railroad company's appli cation to select them as lieu land has been approved as required by law.

From an examination of the several Status having a bearing upon the status of this land involved in the Wass case, as well as from an examination of the adjustments of these several gronts made by the Department in 1891 and in 1903, the Plaintiff had reason to know and did know that the State was not entitled to the tract here in suit, under the act of March 3, 1857, or under any other act.

It seems, therefore, that this action is brought in the first place, and afterwards appealed from Court to Court for the purpose of Delay, for the purpose of making the Defendants such expense and costs as they could neither afford nor provide, for the purpose of intimidating and disheartening neighbors who might have claims of a similar nature, so that they would abandon their rights, give up their

claims under the homestead law, and purchase the land from the company at an exhorbitant price.

In view of all of which, if it happen that the decision of the State Court is affirmed, we ask the Court to allow defendant in Error under rule 23 of the rules of court, such sum as damages as will compensate them for the outlay they have incurred in defending their homestead and require plaintiff in error to pay such damages as a part of the cost of the case.

P. B. GORMAN,
Solicitor for Defendant in Error,
St. Cloud, Minn.

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Department of the Interior,

WASHINGTON, JANUARY 10, 1911.

E-4038.

02643-02644.

FLORENCE A. COFFIN, ASSIGNEE OF BENJAMIN F. ABELL, AND THE HEIRS OF ALLEN A. DIXON, ALIAS DIXON GARNER,

vs.

CHARLES A. MOORE, WILLIAM MILLEN, NORTHERN PACIFIC RAILWAY CO. ET AL.

Petition Invoking the Supervisory Authority of the Secretary of the Interior.

This case involves the N. W. ¼ of the N. W. ¼ and S. ½ of the N. W. ¼ of Sec. 5, T. 53 N., R. 11 W., Duluth, Minnesota, land district, and is before the Department on the petition of Florence A. Coffin, invoking the supervisory authority of the Secretary of the Interior, and requesting a consideration of her claim to said land, based on soldiers' additional homestead applications which, while of record in the General Land Office, were not considered by the Depart-

ment at the time the previous decision affecting said land was rendered.

It appears that the land involved was selected by the Northern Pacific Railway Company, October 17, 1883, as second indemnity, which selection was canceled March 11, 1897, but the cancellation rescinded May 26, 1900, in view of the decision of the Supreme Court in 177 U. S., 435; that on March 12, 1907, the selection was again canceled, and the cancellation suspended by the General Land Office under date of April 1, 1907; that such suspension was removed, and the company's selection finally canceled November 9, 1909.

It is further shown that in the meantime, and while the land was covered by the railroad company's selection, Charles A. Moore, on October 25, 1895, presented a timber and stone application for said tracts, together with an adjoining lot, which was rejected because of the company's pending selection; that Moore, on September 21, 1901, again presented the timber and stone application for the said lands, which was also rejected because of the company's selection; that on August 24, 1896, Joseph McMahon filed homestead application for said tracts, and on November 12, 1896, William Millen filed homestead application for said tracts, which were rejected for reason of conflict with the company's claim and other pending applications.

By decisions rendered August 15 and December 9, 1901, the Commissioner of the General Land Office awarded to Moore the right to complete his timber and stone application, which action was affirmed by the Department's decision of February 13, 1907, in the case of Charles A. Moore and J. L. Picotte against the Northern Pacific Railroad Company. Millen and McMahon filed motions for review of the Department's decision of February 13, 1907, which were denied October 20, 1909, on the ground that there had been no error in the Commissioner's decision of December 19, 1901, awarding the right of entry to Moore, but the Depart-

ment directed further that if Moore should fail to purchase within sixty days after notice, lot 4 and the S. ½ of the N. W. ¼, the tracts involved in Coffin's applications, would be subject to disposal, at which time the respective claims of Millen and McMahon would then be considered.

February 25, 1910, Moore submitted proof on his timber and stone application, at which time Millen filed a motion in the district land office to dismiss the proof. This motion was denied because the protest upon which it was based was not verified, and Millen appealed to the General Land Office. The register and receiver, while dismissing Millen's protest against the proof of Moore, declined, in view of the former's appeal, to issue final certificate to Moore, but he was allowed to make payment for the land. It was at this stage of the proceedings that a petition was filed on behalf of Florence A. Coffin, invoking the supervisory authority of the Secretary of the Interior and requesting a consideration of her soldiers' additional applications which were filed in the local land office March 20, 1907, and without knowledge of which the Department's decision of October 20, 1909, was rendered.

While it appears that other parties had at some time filed applications for these lands those now before the Department are Charles A. Moore, the timber and stone applicant, who has been allowed to submit proof and make payment, but to whom no certificate has issued; Joseph McMahon, who is asking for a reinstatement of his homestead application; William Millen, who is urging the acceptance of his homestead application originally filed in 1895 and recently renewed; and the petitioner, Coffin. It appears from a statement contained in the letter of the Commissioner of the General Land Office transmitting the record, that the lands have been again applied for by the Northern Pacific Railway Company, whose application was rejected and as a result of which an appeal was taken from the decision of the Commissioner of the General Land Office, where the case is now pending.

It is urged in behalf of Moore that the case is *res adjudicata;* that the Department's decisions of 1907 and 1909 awarding him the preference right of entry finally disposed of all questions respecting the right to make entry of this land. It is claimed in Moore's behalf that he has for nearly fifteen years been involved in litigation respecting this land, has never been in laches, and should be permitted to perfect his claim.

It is urged on behalf of Millen, the homestead applicant, that the claim of Moore is invalid because when originally presented in 1895 the land was offered, and that such land was not subject to timber and stone entry; that the act of May 18, 1898 (30 Stat., 418), while abolishing the difference between offered and unoffered lands, could not have the effect to rehabilitate the invalid application of Moore presented in 1895; and in so far as Moore's later application is concerned it is urged in Millen's behalf that the same must be subject to the latter's prior homestead application.

It is urged on behalf of the petitioner, Coffin, that her applications being the first presented after the cancellation of the railway company's selection, is in fact the only legal application pending for said land and should be allowed; that no rights were acquired by any application presented at the time when the land was covered by the railroad company's indemnity selection; that the ruling of the Department on this question has been uniform for a long period of time and is conclusive; and that the decision of the Department rendered in 1909 without knowledge of petitioner's pending application is in no sense binding upon her, one of the essential elements of the rule of *res adjudicata* being absent from the case, in that Coffin's claim was not considered when the decision was rendered, the Department being in absolute ignorance thereof.

It is true that an indemnity selection presented by a railroad company is not effective against the United States until approved by the Secretary of the Interior; that the Sec-

retary's approval is essential to the validity of any such selection, as the statute provides that indemnity selections must be made under his approval. At the same time, however, it is absolutely necessary to a proper administration of the land laws that there should be some rule respecting the segregative effect of a railroad company's indemnity selection until such time as it can receive proper consideration from the officers whose duty it is to dispose of the same. Having under consideration the necessity for, and effect of, rules of the land department, the Circuit Court of Appeals for the Eighth Circuit has held that it is essential to the impartial exercise of such power as exists in the land department that rules and regulations should be adopted and steadily maintained establishing a uniform practice and method of procedure; that the legislation of Congress was ample for the establishment of such rules, and when promulgated they become a law of property and cannot be ignored by the Department to the subversion of rights acquired under them; and, further, that an established rule of practice of the land department that after a decision by the Secretary has been made canceling an entry of public lands, no subsequent entry of such lands can be made until a decision has been officially communicated to the local land officers and a notation of the cancellation made on their plats and records, is a proper, just, and reasonable rule and is in accordance with the policy of Congress which makes the local offices the place for the initiation and establishment of all claims under its laws. See Germania Iron Company *vs.* James *et al.* (87 Fed. Rep., 811).

The ruling of the Department in cases involving indemnity selections presented by railroad companies and others, is that such selections have a segregative effect if *prima facie* valid, and while pending the land is not subject to any other entry or selection. See Vold *vs.* Northern Pacific Railway Co. (38 L. D., 378), and the recent case of

Aztec Land and Cattle Co. *et al. vs.* Dewer *et al.*, decided December 14, 1910 (not reported).

From what has been stated it will be seen that at the time of the presentation of Moore's timber and stone application in 1895 this land was covered by a *prima facie* valid indemnity selection; that it was so covered at the time of the presentation of the homestead applications of Millen and McMahon in 1896; and that under the ruling cited no rights were initiated by the tender of such applications. At the time of the presentation of the soldiers' additional homestead claim of Florence A. Coffin the railroad company's indemnity selection had been canceled and the land was subject, so far as the record shows, to her soldiers' additional claim.

Having under consideration the effect of the railroad company's selection of lands embraced in the list which was canceled, and the order of cancellation temporarily suspended, the Department held in its decision of March 26, 1908 (Northern Pacific Railway Co., 36 L. D., 328), that all rights initiated upon these lands under any of the public land laws, at a time when they were freed from pending selections and subject to appropriation, will be protected. It is sufficient to say, therefore, that if at the time of the Department's decision of October 20, 1909, the Department had been advised of Coffin's pending application, that decision would not have been rendered, and anything said therein contrary to the views expressed here is recalled and vacated and the case remanded for consideration on the entire record.

(Signed) FRANK PIERCE,
First Assistant Secretary.

[10192]

WEYERHAEUSER *v.* HOYT.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 24. Argued April 27, 28, 1910.—Restored to docket for reargument December 19, 1910.—Reargued January 19, 20, 1911.—Decided February 20, 1911.

It was the purpose of Congress, as evidenced by the original Northern Pacific Land Grant Act of July 2, 1864, c. 217, 13 Stat. 365, and the joint resolution of May 31, 1870, 16 Stat. 378, extending the indemnity limits, to confer substantial rights to the lands within the indemnity limits in lieu of those lost within place limits.

The right of the company to lieu lands lawfully embraced in selections filed with the Secretary of the Interior excluded lands to which rights of others had attached before the selection and also excluded

the right of others to appropriate lands so embraced in such selections pending action by the Secretary.

The power of the Secretary to approve selections is judicial in its nature, and implies the duty to determine as of the time of filing the selection and the doctrine of relation applies to decisions as to validity of such selections.

In this case *held*, that the company's rights to lieu lands embraced in a selection were superior to those of a purchaser under the Timber and Stone Act who filed pending final decision by the Secretary and between the time of decision of the Secretary holding that the selections were unlawful and the subsequent reversal of that decision; and that the final decision related back to the date of the original selection. *Sjoli* v. *Dreschel*, 199 U. S. 564, distinguished.

General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but they are not controlling when the very point is presented in a subsequent case.

General expressions in an opinion such as those in *Sjoli* v. *Dreschel*, 199 U. S. 564, will not be made the basis for overthrowing a uniform rule of the Land Department, involving destructive effects upon property rights existing under different conditions.

The contention in this case, overruled by the Secretary, that the company was not entitled to lieu lands within indemnity limits because not on the same side of railroad as the place lands lost, held to be without merit.

Where a matter regarding selection of lieu land is wholly within the jurisdiction of the Secretary deciding it, this court will assume that the facts on which the decision rested were properly proved.

Humbird v. *Avery*, 195 U. S. 485, followed as to construction of provisions of Sundry Civil Act of July 1, 1898, c. 546, 30 Stat. 597, 620, and decision of Secretary in this case sustained; but *quære* and not decided, as to effect of such provisions on purchasers under the Timber and Stone Act.

Where the object of the bill is to charge the defendant as trustee of land included in lieu limits of a railway grant for the complainant, if it appears that a valid selection was made, proof that defendant's grantor never acquired title to the land would not establish complainant's right to it.

161 Fed. Rep. 324, reversed.

THE facts, which involve the construction of the Northern Pacific Land Grant Acts, are stated in the opinion.

Mr. Charles W. Bunn and *Mr. Frank B. Kellogg*, with whom *Mr. Stiles W. Burr* was on the brief, for appellants in No. 24 and appellees in No. 12.

Mr. Charles W. Bunn for plaintiffs in error in No. 181.

Mr. M. H. Stanford for appellees in No. 24 and appellants in No. 12.

Mr. P. B. Gorman for defendant in error in No. 181.[1]

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Conflicting claims to forty acres of land in the State of Minnesota is the controversy which this case involves. Both parties assert title derived from the United States, the appellants in virtue of a patent issued under a land grant made to the Northern Pacific Railroad Company and the appellees as the result of an alleged purchase under the timber and stone act. The facts are these:

The Northern Pacific Railroad Company in 1883 filed in the Land Department a list of indemnity selections which embraced the land in question. In 1893 a rearranged list was filed, differing from the previous one, in that it specified the particular tract of land lost in the place limits for which each described selection within the indemnity limits was made. The Land Department having ruled that the eastern terminus of the Northern Pacific Railroad Company was not at Ashland but at Duluth, a point west of Ashland, the selections, so far as they related to lands east of Duluth, among which was the land in con-

[1] This case was argued simultaneously with No. 12, *Campbell* v. *Weyerhaeuser*, *post*, p. 424, and *Northern Pacific Railway Company* v. *Wass*, *post*, p. 426.

troversy, were cancelled by order of the Secretary of the Interior. Following this, in December of that year, Richard B. Jones applied to purchase the land under the timber and stone act. A few months after, on February 28, 1898, the Secretary of the Interior made an order formally withdrawing from entry the selected land east of Duluth in order, as was declared, to preserve the right of the railroad company, if any, resulting from the selections previously filed, pending the decision by this court of cases involving whether the eastern terminus was at Duluth or at Ashland. About nine months after this withdrawal, in December, 1898, Jones made his final proof and paid the purchase money, one hundred dollars. The receiver of the local land office, however, recited in the receipt issued to Jones that his rights were "subject to any claim the Northern Pacific Railroad Company may have to the lands herein described."

In 1900 (*Doherty* v. *Northern Pacific Ry. Co.*, 177 U. S. 421, 435) it was decided that the eastern terminus of the Northern Pacific Railroad was at Ashland, and therefore that the Land Department had erred in holding that such terminus was at Duluth. The Secretary of the Interior then formally reinstated the list of selections previously filed by the railroad company, the entry of Jones was cancelled, and the selections were approved and patents issued to the Northern Pacific Railway Company as entitled to all rights under the selections. The railway company conveyed the tract in controversy to Weyerhaeuser and Humbird, the present appellants.

This suit was then begun by Hoyt in a court of the State of Minnesota against Weyerhaeuser and Humbird to compel a conveyance of the land and to restrain the cutting or removal of timber during the pendency of the suit, on the ground that the title was held by the defendants in trust for complainant. The right to relief was principally based upon the contention that the purchase by Jones under the

timber and stone act was paramount to the indemnity selection previously made by the railroad company, and hence that the Land Department had fallen into an error of law in patenting the land to the company. In addition there were numerous other grounds upon which the right to relief was predicated, but we do not deem it necessary now to detail them, as we shall come to state and dispose of them after we have passed upon the contention concerning the paramount nature of the timber and stone entry. The case having been removed into a Circuit Court of the United States, upon the ground that on the face of the bill it involved the construction of acts of Congress, was in that court tried and a decree was entered dismissing the bill. The Circuit Court of Appeals, whose action is now under review, reversed the decree of the Circuit Court and remanded the cause with directions to enter a decree for the complainant granting the relief prayed. 161 Fed. Rep. 324.

The decision of the court was based upon the conclusion that the application to purchase made by Jones, although subsequent in date to the filing by the railroad company of its list of indemnity selections, was paramount to such selections, even although they had been subsequently approved by the Secretary of the Interior. This was not however the result of an interpretation originally considered of the granting act, but was exclusively caused, as shown by the opinion of the court, by what was held to be the authoritative and controlling operation of a decision of this court. *Sjoli* v. *Dreschel*, 199 U. S. 564. The soundness of this view lies at the threshold of the case, since, if it be that the rights of the parties are authoritatively concluded by the ruling in the *Sjoli case*, it will not be necessary to further consider the subject. Coming at once to analyze the ruling in the *Sjoli case* in order to fix its true import, we think it is apparent that the court below was mistaken in holding that the decision was here au-

thoritatively decisive. This is said because we see no escape from that conclusion when the issues in the *Sjoli case* are accurately ascertained and are compared with those here presented.

The Sjoli controversy, succinctly stated, thus arose: A homestead settler went in 1884 upon land within the indemnity limits of the grant to the Northern Pacific Railroad Company. He erected a dwelling-house and moved into it with his family and cultivated a portion of the land, all prior to the filing in 1885 of a list of selections by the railroad company, embracing the tract settled upon by Sjoli. Although the settler had thus prior to the filing of the list of selections entered upon and improved the land with the intention of perfecting title under the homestead laws, his application to enter, for reasons which need not be here adverted to, was not made until subsequent to the filing by the railroad company of its list of selections. Relying upon this fact, the railroad company opposed the application of Sjoli, and the proceedings which took place in the Land Department simply required the department to determine whether the railroad company, by the filing of its list of selections, could deprive the settler Sjoli of his rights, despite the fact that his settlement and improvement of the land had occurred prior to the filing by the company of its list of selections. The Land Department decided in favor of the settler, and a patent was issued to him.

The matter decided by this court in the *Sjoli case* arose from the bringing of a suit by Dreschel, as assignee of the rights of the railroad company, asserting that Sjoli held the land in trust for him as the grantee of the railway company, because the Land Department had, as a matter of law, erred in deciding that the rights of the settler Sjoli were paramount to the subsequent selection by the railroad company, since at the time of the filing of such list of selections no record evidence existed in the Land

Department of the asserted settlement by Sjoli or of his intention to avail of the benefit of the homestead laws. The action of the Land Department in maintaining the paramount right of the settler was sustained. As it is manifest from the statement we have made that the controversy in this case involves no question whatever concerning the rights of a settler initiated prior to the filing by the railroad company of its list of selections, but simply calls upon us to determine whether the Land Department erred in deciding that a filed list of selections was after approval paramount to a subsequent application to purchase, it is at once demonstrated that the question here involved is wholly different from that which was decided in the *Sjoli case*. This difference is as wide as that which would exist between a ruling that one who was prior in time was prior in right, and a directly antagonistic decision that one who was subsequent in time was yet prior in right. And the broad distinction which obtains between the matter which was involved and decided in the *Sjoli case* and the question presented on this record is made, if need be, more apparent when it is considered that in the *Sjoli case* the action of the Land Department in issuing the patent to the settler, because he was prior in time was sustained, while to hold that decision applicable here would reverse the action of the Land Department in issuing a patent to the railway company because it was prior in time. While in view of this difference between the issues involved in the *Sjoli case* and those here arising, we are constrained to the conclusion that the former case cannot be held to be here authoritatively decisive, of course the due persuasive force of the reasoning of the opinion in the *Sjoli case* if here applicable remains, and must be considered when we come, as we now do, to pass upon the controversy here arising, enlightened by the true interpretation of the granting act as elucidated by the applicable decisions of this court.

It is beyond dispute on the face of the granting act of July 2, 1864, c. 217, 13 Stat. 365, 367, and of the joint resolution of May 31, 1870, c. 67, 16 Stat. 378, extending the indemnity limits, that it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits. It is also beyond dispute that as the only method provided by the granting act for executing the grant in this respect was a selection of the lieu lands by the railroad company subject to the approval of the Secretary of the Interior that a construction which would deprive the railroad company of its substantial right to select and would render nugatory the exertion of power of the Secretary of the Interior to approve lawful selections when made would destroy the right which it was the purpose of Congress to confer. That the effect of holding that lands lawfully embraced in a list of selections duly filed and awaiting the approval of the Secretary of the Interior could, in the interim, be appropriated at will by others would be destructive of the right of selection, is not only theoretically apparent from the mere statement of the proposition, but has moreover in actual experience been found to be the practical result of carrying that doctrine into effect. See 25 Opin. Atty. Gen. 632. Considering the language of the granting act from a narrower point of view a like conclusion is in reason rendered necessary. The right to select within indemnity limits was conferred to replace lands granted in place which were lost to the railroad company because removed from the operation of the grant of lands in place by reason of the existence of the rights of others originating before the definite location of the road. The right to select within indemnity limits excluded lands to which rights of others had attached before the selection, and hence simply required that the selection when made should not include lands which at that time were subject to the rights of others. The requirement

of approval by the Secretary consequently imposed on that official the duty of determining whether the selections were lawful at the time they were made, which is inconsistent with the theory that any one could appropriate the selected land pending action of the Secretary. The scope of the power to approve lists of selections conferred on the Secretary was clearly pointed out in *Wisconsin Central Railroad* v. *Price*, 133 U. S. 496, 511, where it was said that the power to approve was judicial in its nature. Possessing that attribute the authority therefore involved not only the power but implied the duty to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections. This view, while it demonstrates the unsoundness of the interpretation of the granting act which the contrary proposition involves, serves also at once to establish that the obvious purpose of Congress in imposing the duty of selecting and submitting the selections when made to the final action of the Secretary of the Interior, was to bring into play the elementary principle of relation, repeatedly sanctioned by this court and uniformly applied by the Land Department from the beginning up to this time under similar circumstances in the practical execution of the land laws of the United States. Without attempting to cite the many cases in this court illustrating and applying the doctrine, a few only which are aptly pertinent and here decisive are referred to. *Gibson* v. *Chouteau*, 13 Wall. 92, 100; *Shepley* v. *Cowan*, 91 U. S. 330; *St. Paul Railroad* v. *Winona Railroad*, 112 U. S. 720, 733; *Oregon & C. R. R.* v. *United States*, 189 U. S. 103, 112; *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 334, and cases cited.

In *Shepley* v. *Cowan* there was conflict between a preemption claim and a selection on behalf of the State of Missouri under an act of Congress conveying to the State a large quantity of land to be selected by the governor,

the act providing that if the selection should be approved by the Secretary of the Interior patents were to issue. The court said (p. 337):

"The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterward issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a state selection takes effect as of the time when the selection is made and reported to the land office; and the patent upon a preëmption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land office."

On page 338, after distinguishing *Frisbie* v. *Whitney*, 9 Wall. 187, and *Yosemite Valley Case*, 15 Wall. 77, the court said:

"But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase, or other acquisition of the land when the United States have determined to sell or donate the property. In all such cases the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

In *St. Paul Railroad* v. *Winona Railroad*, 112 U. S. 720, one of the questions arising for decision was which of two railroad companies was entitled to certain tracts of lieu lands situated within overlapping indemnity limits of certain grants made by an act of Congress to the Territory of Minnesota, to aid in the construction of the roads of the contesting companies. The selections were to be made by the governor, and required the approval of the Secretary of the Interior. The Winona company filed a list of selec-

tions. The St. Paul company made no selections, but nevertheless, on grounds which need not be stated, the Secretary of the Interior certified the lands to the State for the use of that company. The Winona company brought suit in the state court to have a declaration of its rights in the land, and to restrain the St. Paul company and others from receiving a patent or other evidence of title to the lands from the governor of the State. The state court decreed in favor of the Winona company, and this court affirmed its action. In the course of the opinion it was said (page 731):

"The time when the right to lands becomes vested, which are to be selected within given limits under these land grants, whether the selection is in lieu of lands deficient within the primary limits of the grant or of lands which for other reasons are to be selected within certain secondary limits, is different in regard to those that are ascertained within the primary limits by the location of the line of the road."

After referring to prior decisions the conclusion was reached that, as to the lands to be selected, "priority of selection secures priority of right," and that as the Winona company alone had made selection of the lands, and that selection was lawful, the right to the land as against third parties vested in the Winona company as of the date of the filing of its lists of selections. In concluding the opinion it was said (p. 733):

"It is no answer to this to say that the Secretary of the Interior certified these lands to the State for the use of the appellant. It is manifest that he did so under a mistake of the law, namely, that appellant, having made the earlier location of its road through these lands, became entitled to satisfy all its demands, either for *lieu* lands or for the extended grant of 1864, out of any odd sections within twenty miles of that location, without regard to its proximity to the line of the other road. We have already shown that such is not the law, and this erroneous de-

cision of his cannot deprive the Winona company of rights which became vested by its selection of those lands. *Johnson* v. *Towsley*, 13 Wall. 72, 80; *Gibson* v. *Chouteau*, 13 Wall. 92, 102; *Shepley* v. *Cowen*, 91 U. S. 330, 340; *Moore* v. *Robbins*, 96 U. S. 530, 536."

So, also, in *Oregon & C. R. R.* v. *United States*, 189 U. S. 103, the court said (p. 112):

"Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits—which interest relates back to the date of the granting act—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the Land Department; and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make."

The doctrine thus affirmatively established by this court as we have said has been the rule applied by the Land Department in the practical execution of land grants from the beginning. *Porter* v. *Landrum*, 31 L. D. 352; *Southern Pacific Railroad Co.*, 32 L. D. 51; *Santa Fe Pacific Railroad Co.*, 33 L. D. 161; *Eaton* v. *Northern Pacific Railway Co.*, 33 L. D. 426; *Santa Fe Pacific Railroad Co.* v. *Northern Pacific Railway Co.*, 37 L. D. 669. The well-settled rule of the Land Department on the subject was thus stated by the then Assistant Attorney General in the Department, now Mr. Justice Van Devanter as follows:

"Under this legislation the company was, by the direction or regulations of the Secretary of the Interior, required to present at the local land office selections of indemnity lands, and these selections, when presented conformably to such direction or regulations, were to be entertained and noted or recognized on the records of the local office. When this was done the selections became lawful filings;

and while, until approved and patented, they would remain subject to examination, and to rejection or cancellation where found for any reason to be unauthorized, they, like all other filings, were entitled to recognition and protection so long as they remained undisturbed upon the records.

"There is no question in this case as to the sufficiency of the loss assigned, or as to the formality and regularity of the selection.

"What effect has been given to a pending railroad indemnity selection?

"Prior to 1887 the rights of a railroad company within the indemnity belt of its grant were protected by executive withdrawal, but on August 15, that year, these withdrawals were revoked, and the land restored to settlement and entry; but such orders, although silent upon the subject, were held not to restore lands embraced in pending selections. *Dinwiddie* v. *Florida Railway & Navigation Co.*, 9 L. D. 74. In the circular of September 6, 1897, (6 L. D. 131), issued immediately after the general revocation of indemnity withdrawals, it was provided that any application thereafter presented for lands embraced in a pending railroad indemnity selection, and not accompanied by a sufficient showing that the land was for some cause not subject to the selection, was not to be accepted, but was to be held subject to the claim of the company under such selection. In fact, a railroad indemnity selection, presented in accordance with departmental regulations and accepted or recognized by the local officers, has been uniformly recognized by the land department as having the same segregative effect as a homestead or other entry made under the general land laws."

Despite the doctrine of this court as expounded in the cases previously referred to, the unbroken practice of the Land Department from the beginning in the execution of land grants, impliedly sanctioned by Congress during the

many years that administrative construction has prevailed, and the destructive effect upon rights conferred by land-grant acts which would result from applying the contrary view, it is yet urged that this must be done because of decisions of this court which it is insisted constrain to that conclusion. One of the decisions thus referred to is *Sjoli* v. *Dreschel*, 199 U. S. 564, to which we have previously referred, and others are cited in the margin.[1]

What we have already said as to the *Sjoli case* would suffice to dispose of the suggestion concerning that case, but we shall recur to it. As to the other cases, it would be adequate to say that not one of them involved the question here under consideration nor even by way of *obiter* was an opinion expressed on such question. Indeed, all the cases relied upon may be placed in one of three classes: *a*, those involving the nature and character of the right, if any, to indemnity lands prior to selection; *b*, whether such lands, after the filing of a list of selections and before action by the Secretary of the Interior thereon, could be taxed by a State to the railroad company as the owner thereof; and, *c*, those which were concerned with the nature and character of acts which were adequate to initiate a right to public land which would be paramount to a list of selections when the acts were done before the filing of the list of selections. In none of the cases, moreover, was the well-settled doctrine of this court as to relation, even by remote implication, questioned. Indeed, in most of the cases relied upon the previous decisions to which we have referred to expounding the doctrine of relation were approvingly cited or expressly reaffirmed.

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[1] *Ryan* v. *Central Pacific R. R. Co.*, 99 U. S. 382; *Kansas Pacific R. R. Co.* v. *Atchison &c. R. R. Co.*, 112 U. S. 414; *Kansas P. R. R. Co.* v. *Dunmeyer*, 113 U. S. 629, 639, 644; *Wisconsin C. R. Co.* v. *Price County*, 133 U. S. 496, 511; *United States* v. *Missouri &c. Ry.*, 141 U. S. 359, 374, 375; *New Orleans Pacific Ry. Co.* v. *Parker*, 143 U. S. 42, 57; *Hewitt* v. *Schultz*, 180 U. S. 139.

The *Sjoli case*, from the facts we have already stated, is clearly here inapplicable, because it falls in the third of the above classes. If it be conceded that general language was used in the opinion in that case which when separated from its context and disassociated from the issues which the case involved, might be considered as here controlling, that result could not be accomplished without a violation of the fundamental rule announced in *Cohens* v. *Virginia*, 6 Wheat. 399, so often since reiterated and expounded by this court, to the effect that "General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." The wisdom of the rule finds apt illustration here when it is considered that not even an intimation was conveyed in the *Sjoli case* of any intention to overrule the repeated prior decisions of this court concerning the operation and effect of the doctrine of relation upon the approval, by the Secretary of the Interior, of a lawful list of selections. That the general expressions in the *Sjoli case* are not persuasive here clearly results from the demonstration which we have previously made that to apply them would be in effect to destroy the indemnity provisions of the granting act. Moreover, that serious general injurious consequences would arise from treating the expressions relied upon in the *Sjoli case* as persuasive is clear, (*a*) because to do so would result in the overthrow of the uniform rule by which the Land Department has administered land grants from the beginning, a rule continued in force after the decision in the *Sjoli case*, because of the administrative conclusion that that case should be confined to a like state of facts and not be extended to other and different conditions (25 Opin. Atty. Gen. 632); (*b*) because of the destructive effect upon rights of property and the infinite confusion which would now arise from

extending, under the circumstances stated, the observations in the *Sjoli case* to the wholly different state of facts presented upon this record.

While the foregoing disposes of the main propositions which the case presents, there are additional contentions which it is necessary to pass upon. Irrespective of any question as to the paramount nature of a list of selections, it is contended on behalf of appellee, contrary to the ruling of the Secretary of the Interior: *a*, that the selection by the railroad company of the tract in controversy was void and it could not lawfully be approved; *b*, in any event that he was entitled to the land by virtue of the provisions of an act approved July 1, 1898, c. 546, 30 Stat. 620; and, *c*, the Northern Pacific Railway Company did not succeed to the rights of the Northern Pacific Railroad Company in the land, if any right thereto became vested in the latter company.

a. This contention is predicated upon the claim that the selecting company had not sustained a legal loss of the tract in lieu of which the land in controversy was selected, and that if it had sustained the loss the selection was not lawful, because the tract selected was not on the same side of the railroad as the tract lost and was not the nearest unappropriated land to it. These contentions were considered at much length by the Secretary of the Interior in the opinion, copied in the record, affirming the cancellation of the entry of Jones (34 L. D. 105) and were found not to be meritorious. The reasons advanced by the Secretary in support of his rulings upon the legal propositions involved seem to us convincing, and we therefore hold the contentions untenable. Cognate to the contentions just disposed of is a claim made in argument that the filed list of selections was void for the reason that the joint resolution of May 31, 1870, establishing the second indemnity limits, required certain facts to appear in order to entitle the railway company to the land, and that in selecting the

land those requisites were not complied with. The claim substantially embodies merely criticisms directed to the form or regularity of the selection list, and is not, in any view, of such a character as to render void the filed list. The matter being within the jurisdiction of the Secretary of the Interior, we must assume that the facts necessary to establish the right to approve the selections were shown to his satisfaction.

b. This contention asserts that complainant is entitled to the land by virtue of certain provisions relating to the Northern Pacific land grant contained in the subdivision entitled, "Surveying the Public Lands," embodied in the Sundry Civil Appropriation Act of July 1, 1898. The provisions are copied in the opinion in *Humbird* v. *Avery,* 195 U. S., beginning at page 485, and need not be here repeated. As there said, they "disclose a scheme or plan for the settlement of the disputes arising out of the conflicting rulings in the Land Department in reference to the eastern terminus of the railroad, and its action in reference to the public lands between Duluth and Ashland." It is argued that the Secretary of the Interior erroneously decided that the land could not be claimed under the act of 1898 by Jones or his grantee, because prior to January 1, 1898, Jones had done nothing more than to file his application for the land, and was consequently not a purchaser entitled to the benefits of the statute. In our opinion no error was committed by the Secretary in so deciding. Because we reach this conclusion we must not be considered as intimating any opinion whatever regarding the soundness of the contention made on behalf of the appellants, to the effect that in any event the act of 1898 can have no application to one who purchased land under the timber and stone act.

c. It is contended that the Northern Pacific Railway Company, under its charter, had no power to purchase the tract of land here in controversy, and that for various reasons the legal proceedings under which the railway com-

pany asserted it had acquired the rights of the Northern Pacific Railroad Company in the land were ineffective to produce any such result. On this record, however, it is not necessary to pass upon these contentions. As the object of the bill is to seek to charge the defendants as trustees of the land for complainant, plainly, if a valid selection was made, proof that their grantor never acquired title to the land would not establish a right to it in the complainant.

It follows that the decree of the Court of Appeals must be reversed and that of the Circuit Court affirmed.

And it is so ordered.

MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE DAY, dissenting.

This case is of sufficient importance to justify a full statement of the facts, as well as the grounds upon which we feel constrained to dissent from the opinion and judgment of the court.

By the final decree under review the Circuit Court of Appeals for the Eighth Circuit unanimously reversed the judgment of the Circuit Court with directions to give the plaintiff Hoyt, now appellee, the relief asked in his bill.

The general object of the suit was to have it adjudged that the present defendants, Weyerhaeuser and Humbird, now appellants, should hold the legal title to certain lands in Minnesota in trust for the plaintiff and be enjoined during the pendency of the cause, from selling, disposing of or removing, or from attempting to create any charge upon, the timber standing or lying upon the premises in question.

Many questions have been discussed by counsel. But there is one which seems to require special examination. The facts out of which that question arises may be thus stated:

The land in question is the southwest quarter of the southeast quarter of section seven, township fifty-four, of

range fourteen west, principal meridian. It contains forty acres, and is situated in St. Louis County, Minnesota. It is unfit for cultivation, is valuable chiefly for its timber, has no valuable deposit of gold, silver, cinnabar, copper or coal upon it, was at the time mentioned in the record uninhabited, and contained no mining or other improvements.

For the purpose of availing himself of the act of Congress relating to the sale of timber land in California, Oregon, Nevada, and Washington Territory, approved June 3, 1878, 20 Stat. 89, c. 151,—which act was amended August 4, 1892, and its benefits extended to all the States, 27 Stat. 348, c. 375,—one Richard B. Jones, a citizen of the United States and admittedly, in all respects, qualified under the laws of the United States to enter land, filed, December 17, 1897, with the Register and Receiver in the Land Office at Duluth a verified written duplicate statement, in due form, indicating his desire to purchase the land in dispute under the homestead laws of the United States. One of these statements was promptly transmitted by the Receiver to the General Land Office at Washington.

The Receiver, in conformity with law, at once posted in his office, for the required time, the fact of such application, describing the lands by legal subdivision and furnishing Jones a copy of such notice. That notice was duly published in the newspaper nearest to the land. On the twenty-seventh day of March, 1898, no adverse claim to the land having been filed in the Land Office, the applicant, Jones, after furnishing to the local Register satisfactory proofs of the preliminary facts required by law, *paid to the Receiver the full purchase price of the land*, together with all fees legally due to those officers. Thereupon he was permitted, December 10, 1898, to enter, and *did* enter the land, the Receiver executing and delivering to him at the time an *official receipt and certificate of purchase*. In December, 1898, all the papers and testimony in the matter

of Jones' application, including his certificate of purchase, were transmitted by the Register and Receiver to the General Land Office at Washington, *and by that office was received and filed.* On December 19, 1898, Jones and wife sold and conveyed the land to Minnie Stewart, by deed properly recorded on October 3, 1902. Stewart and wife conveyed to Hoyt, the present plaintiff, now appellee, and that deed was also duly recorded October 3, 1902.

On the second day of December, 1901—nearly *three* years *after Jones got his certificate of purchase and after he had sold the land*—the Commissioner of the General Land Office made a decision, holding for cancellation the entry made by Jones, as above stated, declaring it to be void on the ground that this land (using the words of the Commissioner) "was selected by the Northern Pacific Railroad (now Railway Company) October 17th, 1883 for the second indemnity, per list, rearranged list 15 B, in lieu of land in Section 11, T. 46, R. 16 W., in the primary limits disposed of between date of grant and definite location of the road, which selection has not since been abandoned or the basis otherwise used. The selection was cancelled, however, by letter of March 22, 1897, because the land is east of Duluth, the then [supposed] eastern terminal of the grant under departmental ruling; but said cancellation was rescinded and the selection restored by letter of May 26, 1900, under the decision of the U. S. Supreme Court, *United States* v. *Northern Pacific R. R. Co.*, 177 U. S. 435, that the grant extends to Ashland, Wisconsin. December 17, 1897, Richard B. Jones applied to purchase said tract under the Timber & Stone law, and after due publication and proof, made entry thereof December 10, 1898. Cash certificate No. 14812. Under the decision of the court, the selection of the company is a valid selection, and the claim of Jones not having been perfected prior to January 1, 1898, his claim is not within the act of July 1, 1898 (Departmental decision of May 22, 1900, *Salter* v.

Company). Said entry is therefore hereby held for cancellation for conflict with the prior valid selection of the company, subject to appeal. Notify him hereof; the company will be informed by this office."

It does not appear that Jones, or any one claiming under him, had any previous notice of this order, or that there was any trial or regular hearing of the matter in the General Land Office.

Upon appeal to the Secretary of the Interior, the above order of December 2, 1901, was affirmed, and subsequently, but not until October, 1905, a patent was issued to the Northern Pacific Railway Company. 35 L. D. 105.

When Jones entered and purchased the land, paying the Government price for it, and receiving a certificate of his purchase—*which purchase was made and which certificate was given nearly seven years before a patent was issued to the Railroad Company*—there was in the Land Office a *list* of selections alleged to have been filed by the Railroad Company on October 17, 1883. But the list did not assign each selection to specific land in the granted limits, which it was asserted had been lost by the company. That list was received at the local Land Office, and transmitted to the General Land Office. But on the eleventh of April, 1893 the Railroad Company, acting under the direction or suggestion of the Secretary of the Interior, "rearranged" its list so as to specify the particular tract lost in the primary limits. In such list the lands in dispute here were set opposite to particular lands lost in those limits. The lands mentioned in the company's list, whether we take the original or rearranged list, were, it must be remembered, within the *indemnity* limits of the grant made by Congress in 1864 in aid of the construction of the Northern Pacific Railroad. That is not disputed.

The principal assignment of error is that the entry and purchase by Jones—under whom Hoyt claims—of the lands in question were *subordinate* to the rights acquired

by the mere *filing* of the *list* of selections by the Railroad Company, followed as that was by the approval of the Secretary of the Interior and by a patent, although *such approval was not given nor*, as we have seen, *the patent issued to the Railroad Company, until many years after Jones received his certificate of purchase from the Government.*

Upon final hearing in the Circuit Court, the bill was dismissed. But upon appeal to the Circuit Court of Appeals, all the judges concurring, that judgment was reversed, and the case sent back with directions to enter a decree for the relief asked in the bill. Rec. 214; *Hoyt* v. *Weyerhaeuser*, 161 Fed. Rep. 324. The principles in the latter case were accepted and applied by the Supreme Court of Minnesota in *Northern Pacific Ry. Co.* v. *Wass*, 104 Minnesota, 411.

Section 3 of the charter of the Northern Pacific Railroad Company of July 2, 1864, provided: "And be it further enacted, that there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or

parts of sections shall have been granted, sold, reserved, *occupied by homestead settlers*, or preëmpted, or otherwise disposed of, *other lands* shall be selected by said company *in lieu thereof, under the direction of the Secretary of the Interior*, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. . . ."

But Congress afterwards broadened or extended the limits into which the Railroad Company, under the direction of the Secretary, might go in order to supply deficiencies in the granted limits. By the joint resolution of May 31, 1870, c. 67, 16 Stat. 378, amending the above act of 1864, "Second indemnity limits" were created. The resolution provided: "And in the event of there not being in any state or territory, in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of 1864 to the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, preëmpted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. . . ."

The fundamental inquiry in the case is whether Jones' entry, occupancy and purchase of the lands were subject or subordinate to the *previous filing* of the list of selections by the Railroad Company, the Secretary of the Interior not having approved such list until after such entry, occupancy, and purchase by Jones. The judgment below

proceeded upon two principal grounds: 1. That the Railroad Company did not acquire *any right or interest* in the lands selected within indemnity limits by the *mere filing* of its *list of selections*. 2. That *after* such list was filed, and while it was *unapproved* by the Secretary, the lands remained fully *open to entry and purchase* by homesteaders and preëmptors under the laws of the United States; that in the absence of the approval of the Secretary of the Interior, the *mere filing* of the lists put *no obstacle whatever* in the way of homesteaders or preëmptioners seeking to acquire public lands not already appropriated or sold under the laws of the United States; and that by an entry or purchase in conformity with the homestead or preëmption laws a right *attached* to those lands in favor of the entryman which could not be destroyed or overriden by any *subsequent* approval by the Secretary of the Interior of the original or rearranged list of selections made by the Railroad Company.

These grounds were sustained by a well-reasoned opinion delivered by Judge Sanborn on behalf of the Circuit Court of Appeals. In view of the elaborate discussion by counsel and by the majority of my brethren, it will be instructive to make a liberal extract from that opinion. After observing that lands within *indemnity* limits did not cease to be public lands open to settlement under the homestead laws, simply because of their having been embraced in a list of selections filed by the Railroad Company to supply losses within place limits, the Circuit Court of Appeals (the italics being ours) said: "The company's unapproved selections did not, therefore, stand in the way of the lands being occupied and entered under the homestead laws. The mere filing of its lists of selections of indemnity lands *did not have the effect to exclude them from occupancy under the preëmption or homestead laws*. . . . The question here is not the jurisdiction but the legality of the decision of the Land Department

and especially of the Secretary, its head, whereby he awarded this land to the Railway Company. The facts and the law warranted and required its award and sale to Jones. When he presented his application to purchase it under the Timber and Stone Act the Railway Company's selection of it was *unapproved* by the Secretary and that company was without equitable right to it. The Land Department had jurisdiction to accept the application of Jones and to sell the land to him, or to approve the selection of the company and to award the land to it. It exercised this jurisdiction, accepted the application of Jones, permitted him to enter the land, to prove up his claim to it, sold it to him, took his $100.00 in payment for it and issued to him his receiver's receipt, *and it did all this before the selection of the company was approved and before the company could acquire any right to the land.* Jones' equitable title to the tract *had then vested*, and while the jurisdiction of the Land Department continued until the patent issued, its power was neither arbitrary, unlimited nor discretionary, and its action was subject to judicial correction for error of law, fraud or clear mistake. The jurisdiction and power of disposition which the Land Department has of the lands of the United States, like the power of every other department of the government, is subject to the laws of the land, and the Land Department's violation or disregard of them is remediable in the courts. Its power 'cannot be exercised so as to deprive any person of land lawfully entered and paid for. *By such entry and payment* the purchaser secures a *vested interest in the property and a right to a patent therefor*, and can no more be deprived of it by order of the commissioner, than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way will be corrected whenever the matter is presented so that the judiciary can act upon it.' *Cornelius* v. *Kessel*, 128 U. S. 456, 461; *Germania Iron Co.* v. *James*, 89

Fed. Rep. 811, 818, 32 C. C. A. 348, 354, 355; *James* v. *Germania Iron Co.*, 46 C. C. A. 476, 481, 107 Fed. Rep. 597, 602; *Black* v. *Jackson*, 177 U. S. 349, 357; *Orchard* v. *Alexander*, 157 U. S. 372; *Brown* v. *Hitchcock*, 173 U. S. 473, 478. . . . Finally counsel invokes the familiar rule that the decisions of officers of other departments of the government upon questions within their jurisdiction are cogent and persuasive, and should be followed by the courts unless they are clearly erroneous, and he reminds us that the Secretary of the Interior and the Commissioner of the General Land office have carefully considered the questions in this case and have decided that Jones was without legal or equitable claim to this land and that the right of the Railway Company to it was superior. But Jones *was a qualified entryman.* The attempted withdrawals and selections of the land by the Secretary prior to his approval of the company's selection *were unauthorized by law and without legal effect.* The land was open to entry and purchase *until he approved the selection. Jones entered, bought and paid for it before any such approval was made.* And the decisions of the Supreme Court which have been cited leave no doubt that the Secretary and the Commissioner fell into a plain error of law when they took the land which Jones had lawfully purchased from him or from his grantees and gave it to the Railway Company. Erroneous decisions of questions of law by the officers of the Land Department cannot be permitted to deprive the equitable owner of his vested right to lands which he has lawfully purchased from the United States. *Johnson* v. *Towsley*, 13 Wall. 72, 80; *Gibson* v. *Choteau*, 13 Wall. 92, 102; *Shepley* v. *Cowan*, 91 U. S. 330, 340; *Moore* v. *Robbins*, 96 U. S. 530, 536; *St. Paul R. R. Co.* v. *Winona Railroad*, 112 U. S. 720, 733. The conclusion is that by his entry and purchase Jones acquired the entire beneficial ownership and the equitable right to the land in controversy and that the Railway

Company and its successors in interest obtained nothing under the patent but the naked legal title which they held in trust for him and for his successors in interest. This conclusion renders the other questions presented in this case immaterial. The decree must accordingly be reversed and the case must be remanded to the court below with directions to enter a decree for the complainant for the relief prayed in the bill, and it is so ordered."

Many cases, among which was the recent case of *Sjoli* v. *Dreschel*, 199 U. S. 564, were cited by the Circuit Court of Appeals to sustain its conclusion. Attention is specially directed to that case because it was only recently decided after full consideration. The facts in it differ, in some respects, from those in the case now before us, but the principles announced in the *Sjoli case* were clearly the result of previous cases. They directly bear upon the question now under consideration.

It appears from the report of the *Sjoli case* that he *settled* on the land there in dispute in 1884 and his original application was in 1889; whereas, the Railroad Company filed its list of selections of lands within indemnity limits to supply deficiencies in place limits in 1885, Sjoli then being in the actual occupancy of the land, and having the intention, by a formal application, to perfect his claim under the homestead laws. Dreschel claimed under the Railroad Company. Sjoli got a patent in 1901 based primarily on his prior occupancy. That was after the company filed its selections. The essential question in the case was as to the rights of the homestead settler as against the Railroad Company which had filed its list of selections of the lands after the homesteader settled on the lands with the intention to acquire them, but before he made his formal application for them. Summing up the doctrines previously established, this court declared in the *Sjoli case* that from its previous cases the following propositions were to be deduced: "That the Railroad Com-

pany will not acquire a vested interest in particular lands, within or without place limits, merely by filing a map of general route and having the same approved by the Secretary of the Interior, although, upon the *definite location of* its line of road, and the filing and acceptance of a map thereof in the office of the Commissioner of the General Land Office, the lands within *primary* or place limits, not theretofore reserved, sold, granted, or otherwise disposed of, and free from preëmption or other claims or rights, become segregated from the public domain, and no rights in such *place* lands will attach in favor of a settler or occupant who becomes such after definite location; that no rights to lands within *indemnity* limits will attach in favor of the Railroad Company until *after* selections made by it *with the approval of the Secretary of the Interior; that up to the time such approval is given,* lands within *indemnity* limits, *although embraced by the company's list of selections,* are subject to be disposed of by the United States, *or to be settled upon and occupied under the preëmption and homestead laws of the United States;* and, that the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected *with his approval,* to supply deficiencies within the place limits of the company's road." The words in the *Sjoli case,* "that up to the time such approval [by the Secretary] is given, lands within indemnity limits, *although embraced by the company's list of selections,* are subject to be disposed of by the United States *or to be settled upon and occupied under the homestead laws of the United States*"—were cited with approval in the very recent case of *Osborn* v. *Froyseth,* 216 U. S. 571, 578, and was really *the basis of the decision in that case.*

But the defendants insist that as Jones' occupancy of and application for the land was made while there was pending in the Land Office an unapproved *list* of selections

of lands (including the land in question), which the Railroad Company desired to appropriate in order to supply deficiencies in its primary limits, the subsequent approval by the Secretary of the company's list—although such approval did not in fact occur until 1905—overrode and annulled any right previously acquired by the homesteader Jones, although he applied, paid for and got his certificate of purchase *more than six years* prior to the *actual approval* by the Secretary of the Interior of the original or rearranged selection of these lands. We do not concur in this view. This view cannot be sustained without entirely disregarding the doctrines announced upon full consideration in many other cases, prior to the *Sjoli case.*

As counsel have made an earnest and extended argument in support of the contrary view it may be well to recall a few leading cases on the subject, and see just what has been adjudged.

In *Ryan* v. *Central Pacific R. R. Co.*, 99 U. S. 382, the court construed the second section of the act of July 25, 1866, c. 242 (14 Stat. 239), granting to a company, for the purpose of aiding in the construction of a railroad and telegraph line, alternate odd sections of public land, for ten miles on each side, subject, however, to the condition that the Railroad Company might, *under the direction of the Secretary*, select alternate odd sections, within ten miles on each side, nearest the place limits, to supply deficiencies in lands found to have been granted, sold, reserved, occupied by homestead settlers, preëmpted or otherwise disposed of. As to lands in the *place* limits, the court said that the right of the company to the odd sections became fixed and absolute, when the road was located and the maps of such location were filed. But, said the court, speaking by Mr. Justice Swayne, "with respect to the lieu lands, as they are called, the right was a float, and attached to no specific tracts *until the selection was actually*

made in the manner described." In that case the selection made by the company was approved by local land officers and confirmed by the Secretary of the Interior, *when there was no claim upon it.* The court further said, in reference to the land actually selected under the direction of the Secretary, that "the Railroad Company had not and *could not have any claim* to it until *specially selected* as it was for that purpose. It was taken to help satisfy the grant to the extent that the odd sections originally given failed to meet its requirements. When so selected there was no Mexican *or other claim over it.*" In the same case, referring to the deficiency alleged to exist in the place limits, the court said: "It was within the secondary or indemnity territory where that deficiency was to be supplied. The Railroad Company had not, and could not, have any claim to it until specially selected, as it was for that purpose." This language was quoted with approval in *Osborn* v. *Froyseth,* 216 U. S. 578. So, in the present case when Jones entered and purchased there was no claim upon these lands that gave the Railroad Company any *right* or *interest* whatever in them which could be asserted in opposition to the entryman, whose rights had *attached before any approval* of the selections.

A similar question under another land grant act arose in *Kansas Pacific R. R. Co.* v. *Atchison &c. R. R. Co.,* 112 U. S. 414. The claim in that case was under an act of Congress of July 1, 1862, c. 120 (12 Stat. 489), which made a grant of lands designated by odd numbers on each side of the railroad, "which were not sold, reserved or otherwise disposed of by the United States and to which a preëmption or homestead claim had not attached at the time the land was definitely fixed." This court, speaking by Mr. Justice Field, said: "A right to select them [lands] within certain limits in the case of deficiency within the ten mile limit, was alone conferred, *not a right to any specific land or lands capable of identification by any principles of law or*

rules of measurement. Neither locality nor quantity is given, from which such lands could be ascertained."

In *Kansas P. R. R. Co.* v. *Dunmeyer*, 113 U. S. 629, 639, 644, which involved rights under the act of July 2, 1864, (c. 317, 13 Stat. 365), granting lands to a railroad company the court, speaking by Mr. Justice Miller, said: "The reasonable purpose of the Government undoubtedly is that which it expressed, namely, while we are giving liberally to the Railroad Company, we do not give any lands we have already sold, *or to which, according to our laws*, we have permitted *a preëmption or homestead right to attach.* No right to *such* land passes by this grant. No interest in the Railroad Company attaches to *this* land or *is to be founded on this statute.*" This case was followed in *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 357, 366; *Whitney* v. *Taylor*, 158 U. S. 85, 92–3, and *Northern Pacific R. R. Co.* v. *Sanders*, 166 U. S. 620.

In *Wisconsin C. R. Co.* v. *Price County*, 133 U. S. 496, 511, the court, speaking by Mr. Justice Field, in determining the effect of the mere filing of the list of selections, said: "*Until the selections were approved* there were *no selections in fact*, only preliminary proceedings taken for that purpose; and *the indemnity lands remained unaffected in their title. Until then* the lands which might be taken as indemnity were *incapable of identification; the proposed selections remained the property of the United States.* The Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, *until it was executed, created no legal interest which could be enforced in the courts.*" The *mere filing of lists of* selections after the acceptance of the map of definite location of the railroad line between Duluth and Ashland *gave the company no such title as could be enforced by the courts in a suit between private parties.* It is true, the Government was under a promise to give the Railroad Company lands

in the indemnity limits to supply losses in place limits. But, as adjudged in the above cases, that promise *passed no title.* See *Humbird* v. *Avery,* 195 U. S. 480, 507, in which it was said that "no title to indemnity lands is vested until a selection be made by which they are definitely ascertained and the selection made approved by the Secretary of the Interior. This principle is firmly established"—citing *Wisconsin Central R. R.* v. *Price, and other cases.*

In *United States* v. *Missouri &c. Railway,* 141 U. S. 359, 374–5, which case related to a railroad land grant, it was observed that certain *even*-numbered sections within the indemnity limits of the particular railroad concerned could, under the statute there in question, have been legally selected as indemnity lands, if no rights had attached to them before their selection, with the *approval of the Secretary of the Interior.* The court then proceeds: "We say, prior to such selection and approval, because as to lands which may legally be taken for purposes of indemnity the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted, but, in the fullest legal sense, remains in the United States, *until* they are *actually* selected *and set apart, under the direction of the Secretary of the Interior, specifically for indemnity purposes*"—citing, among other cases, *Sioux City &c. Railroad* v. *Chicago, Milwaukee &c. Railroad,* 117 U. S. 406, 408, in which the court, speaking by Mr. Justice Miller, said: "No title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, *and the selection made approved by the Secretary of the Interior.*"

In *New Orleans Pacific Railway Co.* v. *Parker,* 143 U. S. 42, 57, the language of the court was: "As to lands within the indemnity limits, it has always been held that no title is acquired until the specific parcels have been selected *and approved by the Secretary of the Interior*"—citing numerous cases.

A full discussion of the rights of parties in respect of lands in indemnity limits will be found in *Hewitt* v. *Schultz*, 180 U. S. 139, which was determined after great deliberation in 1901. In that case the question arose whether it was competent for the Secretary of the Interior, after receiving from a railroad company its map of the definite location, could at once withhold or withdraw from sale or entry the odd-numbered sections within the *indemnity* limits to which the company, with the assent of the Secretary, might be permitted to resort in order to supply deficiencies in place limits. Referring to the opinions of Secretaries Lamar, Vilas and Smith, and approving their views, the court held such withdrawal to be unauthorized, indeed, *forbidden*, by the statute in respect to lands, within the *indemnity* limits, *left open by Congress for homesteaders or preëmptioners while the title remained in the United States.* The opinions of those Secretaries proceeded upon the ground taken in previous decisions of this court, that a right to select lands within indemnity limits "was alone conferred, not a right to any specific land or lands capable of identification by any principle of law or rules of measurement;" but that "the right of selection became a barren right, for, *until selection* was made the title remained in the Government, subject to its disposal at pleasure." In the opinion of Secretary Vilas, approved by this court in the *Hewitt case*, it was said: "It [the act of Congress] gave to any person entitled under the preëmption or homestead laws to take any such lands *the absolute right to acquire any proper quantity thereof, in accordance therewith;* and *this right an executive officer could not deprive the settler of.*"

In *Oregon & C. R. Co.* v. *United States*, 189 U. S. 103, the court said: "Having regard to the adjudged cases, it is to be taken as established that, unless otherwise expressly declared by Congress, *no right* of the Railroad Company *attaches*, or *can* attach to specific lands within indemnity

limits *until there is a selection under the direction, or with the approval, of the Secretary.*"

Many other cases to the same effect might be cited.

It is, however, contended that the approval by the Secretary of the Interior of the selection of these lands to supply deficiencies in place limits had relation *back to the date* when the railroad *filed its original list of selections*, and had the effect to override any rights acquired by the homesteader *after* that list was filed, and *before such approval.* This view, if sustained, would practically destroy the rights given to homesteaders and preëmptioners by the acts of Congress as uniformly interpreted by this court. Even after the filing of a list of selection of lands by the beneficiary under the act of Congress, Jones was entitled, of right—prior to the actual approval by the Secretary of the proposed selections—to apply for the lands in dispute, pay for them, get a certificate of his purchase and in that way acquire them. That right *attached* to the lands *when he entered upon and applied for them under the homestead laws*, and he could not be arbitrarily prevented from paying the Government price, and obtaining a certificate of purchase, and perfecting his claim under those laws.

Now, if it be true, and all the cases so hold, that *after* the filing of a list of selections by the Railroad Company of lands within indemnity limits, such lands nevertheless remained fully open to entry, occupancy and purchase by homesteaders; if, as held in *Hewitt* v. *Schultz*, above cited, the Secretary of the Interior himself could not, immediately upon the filing of a list by the Railroad Company of selections of indemnity lands, withdraw such lands from entry or sale, and thus prevent their being entered, occupied and purchased by homesteaders, *prior* to the Secretary's *actual approval* of *such* selections; and if the *mere filing* of the list did not, in itself, in advance of any approval by the Secretary, give the land-grant beneficiary any right or claim whatever, legal or equitable, in or to any

particular lands specified in the list; then there is no basis whatever for the contention that the Secretary's approval of the selection of indemnity lands, *after* the homesteader's claim *attached* to them, can be referred back *to the day* on which the Railroad Company *filed* its list of lands within indemnity limits, sought to be taken by it—an act on his part which, *all the cases agree, did not give it any enforcible interest in particular lands.* That would be using the doctrine of relation, which is a mere fiction of law, to defeat the manifest will of Congress. To state the proposition in another way: If the lands embraced by the company's list of selections were, under the statute, fully open, *after* the filing of that list, to *entry, occupancy and sale, for the benefit of homesteaders*—and that cannot be disputed—how is it possible upon any sound principle, or consistently with the policy adopted by the Government to encourage settlements, that the right thus given to the homesteader could be annulled by any action of the Secretary occurring *after* that right accrued and *became attached* to the lands in behalf of the homesteader? A preference cannot be given in this way to the Railroad Company over the homesteader if regard be had to the purpose of Congress to keep the unappropriated public domain effectively, fully and completely open to settlers so long as the legal title remained in the United States, or until some right of the company *actually attached* to the lands settled upon. A different view cannot be sustained except upon the theory that the mere *application* of a railroad company to take particular lands to supply losses in place limits had the effect to take those lands out of the public domain and prevent their occupancy by homesteaders until it suited the Land Department—which might postpone its ruling for many years—to take up the application and pass upon it; and this, notwithstanding indemnity lands were fully open to be settled upon by homesteaders so long as the title remained in the United States.

At a very early date in the administration of the public lands this court, speaking by Mr. Justice Campbell, in *Clements* v. *Warner*, 24 How. 394, 397, said: "The policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity, to become the purchasers of a limited extent of land comprehending their improvements, over that of any other person. By the act of Sept. 4, 1841, c. 16 (5 Stat. 453), the preëmption privilege in favor of actual settlers was extended over all the public lands of the United States that were fitted for agricultural purposes and prepared for market. Later statutes enlarged the privilege, so as to embrace lands not subject to sale or entry, and clearly evince that the actual settler is the most favored of the entire class of purchasers." In the recent case of *Ard* v. *Brandon*, 156 U. S. 537, 542, the court, speaking by Mr. Justice Brewer (after referring to *Shepley* v. *Cowan*, 91 U. S. 330, 338), said that "the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon. *If he does all that the statute prescribes as a condition of acquiring rights, the law protects him in those rights,* and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application." The court, in that case, then referred with approval to the observations above cited from *Clements* v. *Warner*, and proceeded: "There can be no question as to the good faith of the defendant. He went upon the land with the view of making it his home. He has occupied it ever since. He did all that was in his power in the first instance to secure the land as his homestead. That he failed was not his fault; it came through the wrongful action of one of the officers of the Government." See also *Northern Pacific R. R.* v. *Amacker*, 175 U. S. 567.

In support of the contrary view much reliance is placed

upon the general rule "that where there are divers acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred; and to this the other acts shall have relation," Viner's Abridg. tit. Relation, 290; or, as stated by Cruise (5 Real Prop. 510, 511), that "all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." This rule may well apply where the inquiry relates to rights asserted in lands expressly granted in the *place* limits of a road; for, such grants are *in præsenti*. So, perhaps, it might be applied where the contest, under a railroad grant, is between *the Government and its grantee*, who was authorized to make selections of lands within indemnity limits to supply losses in place limits occurring before a specified time. As in *United States* v. *Anderson*, 194 U. S. 394, 399, where the court said: "But even though it be conceded, *arguendo*, that the doctrine in question would allow rights to be acquired by third parties to the injury of the applicant after the making of the selections and pending approval thereof by the Government, it does not follow that it controls the controversy here presented. This results because on this record *the rights of third parties are not involved*, since the controversy concerns only the rights of the United States to *retain as against its grantees* the proceeds recovered by it as the result of a trespass upon land after an application for the selection of such land and pending action thereon by the proper officers of the Government. Under these circumstances the case is one for the application of the fiction of relation, by which, in the interest of justice, a legal title is held to relate back to the initiatory step for the acquisition of the land." But clearly the rule should not be applied in a land-grant case in which the mere filing by the railroad beneficiary at the outset of a *list* of selections of indemnity lands does not affect the title of the United States, and has not, in and of itself, any such efficacy as to

become the basis of a right or interest *in the particular lands* mentioned in such list; especially when, as here, those lands, being within indemnity limits, remain open, according to all the authorities, to entry, occupancy and even purchase by homesteaders to the same extent they would have been had no list of selections ever been filed. In both a practical and legal sense the *filing* of such list was nothing more *than the expression of a desire* or *a request that the Secretary of the Interior permit the company* to *have certain indemnity lands to supply losses in the place limits.* The Secretary might unduly delay his decision, might never act on such request and thereby, for an unreasonable time, delay settlement on the public lands by those who seek homes on them, and are always dealt tenderly with by the United States. Before such request was acted on in this case rights of the homesteader intervened and became lawfully *attached* to the lands. If the homesteader acquired a *right* in these indemnity lands by entry, occupancy and purchase under the homestead laws, as he undoubtedly did, it is inconceivable that such right could, under any proper application of the doctrine of relation, be affected or overthrown by referring to an antecedent act performed by a different person, but which, *at the time it was performed, did not give any right or interest whatever in the lands,* and interposed no legal obstacle that would prevent homesteaders from entering, occupying or purchasing them. In support of the Railroad Company's position several cases are cited, to some of which we will refer.

The first of these cases, in point of time, is *Campbell* v. *Doe*, 13 How. 244. But that case has no bearing on the precise point under consideration. That was the case of a contest under an act of Congress giving school lands to townships, the selection to be made by the Secretary of the Treasury. One Hamilton made, as he supposed, a selection of certain lands under that act in conformity with regulations prescribed by the Secretary. But his

selection was made while the lands were legally reserved from sale, and he had prior notice of that fact. The land was consequently *not then open to selection*, except pursuant to the act of Congress and the regulations of the Secretary. After alluding to some minor views advanced in the case, this court said: "But in whatever light this may be viewed, we are clear that the Secretary of the Treasury had the power, under the act of Congress, to make the selection; and his decision, declaring the entry of Hamilton invalid, under the circumstances, conclusive." Referring to the argument that what was done by Hamilton was with approval of the Land Office, through whom the Secretary executed the power conferred upon him, the court said: "Yet where the Secretary has interposed and decided the matter, as in the case under consideration, his decision must be considered as the only one under the law."

The opinion in *Campbell* v. *Doe* closes with the suggestion that "under the circumstances no right became vested in him, Hamilton, by reason of his entry of the land, which could be regarded or enforced by *a court of equity*." The court did not refer, although counsel did, to the rule about the relation of time as between two acts, each of which is, in itself, efficacious to give *some substantial right* and was performed by different persons, at different times. It was adjudged in that case—and it was the only point that need have been determined—that the court could not go behind the decision of the Secretary of the Treasury, and that in no view of the case presented could the relief asked be granted by *a court of equity;* whereas, in the case now before us it must be admitted, in view of the act of Congress and the cases determining its scope and effect, that when Jones occupied and entered, as well as when he purchased the land in dispute, it *was part of the public domain*, subject to the control of the United States and *open to homesteaders and preëmptioners*, under the

laws of the United States, although there may have been at the time, on file, a list of unapproved selections by the Railroad Company.

Another case much relied on in this connection by the appellants is *Shepley* v. *Cowan*, 91 U. S. 330, 337. That case arose under the act of Congress of September 4, 1841, granting lands to certain States, including Missouri, for purposes of internal improvement, saving such as were or might be reserved from sale by any act of Congress or the proclamation of the President. The plaintiffs claimed title under a patent issued to one McPherson by the State, and purporting to be for lands *selected by the State* under the above act of 1841. The defendants claimed title under a patent issued by the United States to the heirs of one Chartrand, based on an alleged preëmption right acquired by a settlement of their ancestor. McPherson paid for the lands in dispute and got a certificate showing such fact. The selections authorized to be made were subject to the approval of the Secretary of the Treasury. That officer gave such approval. This court, referring, however, to the facts and to certain acts of Congress, held that the State *could not legally select* the lands in dispute as part of those granted by act of 1841, because they were "*legally* reserved from sale," consequently nothing could be claimed under the selection of McPherson. This view was sufficient to dispose of that case. Nevertheless, the court proceeds to consider another view which was held to be fatal to the claim made under the patent issued to McPherson. "If," the court said, "the land outside of the survey as retraced by Brown in 1834 could be deemed public land, open to selection by the State of Missouri from the time the survey was returned to the land office in St. Louis, it was equally open from that date to settlement, and consequent preëmption by settlers. The same limitation which was imposed by law upon settlement was imposed by law upon the selection of the State. In either

case the land must have been surveyed, and thus offered for sale or settlement. The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a State selection takes effect as of the time when the selection is made and reported to the Land Office; and the patent upon a preëmption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local Land Office. The action of the State and of the settler must, of course, in some way be brought officially to the notice of the officers of the Government having in their custody the records and other evidences of title to the property of the United States before their respective claims to priority of right can be recognized. But it was not intended by the 8th section of the Act of 1841, in authorizing the State to make selections of land, to interfere with the operation of the other provisions of that Act regulating the system of settlement and preëmption. The two modes of acquiring title to land from the United States were not in conflict with each other. *Both were to have full operation*, that one controlling in a particular case under which the first initiatory step was had. . . . But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, *as against each other*, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all *such* cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right. So in this case, Chartrand, the ancestor, by his

previous settlement in 1835 upon the premises in controversy, and residence with his family, and application to prove his settlement and enter the land, obtained a better right to the premises, under the law then existing, than that acquired by McPherson by his subsequent State selection in 1849. His right thus initiated could not be prejudiced by the refusal of the local officers to receive his proofs upon the declaration that the land was then reserved, if in point of fact the reservation had then ceased." It thus appears that the general rule determining the rights of parties under two different acts, performed at different times, was referred to and applied in a case where *each* act was of such *a substantial* character as *in itself to give a right, enforcible by law.* In the case referred to the selection by the State was wholly void, and could not be made the basis of *any* right acquired in opposition to the rights of the settler, although it was prior to the act performed by the settler. The "initiatory step" referred to in *Shepley* v. *Cowan* was necessarily a step which, *in itself*, gave *some interest* in the particular land involved. In the present case, the subsequent act of the homesteader was confessedly in accordance with law, gave him a substantial interest in the land, and was not defeated by reason of the prior act of the Railroad Company in merely filing its list of selections. We say this for the reason that such filing, according to the adjudged cases, *could not be made the basis of any right or interest in these particular lands.* Within the true meaning of the rule as to the relation of time between two acts of a substantial character, performed at different times, the initiatory step was that taken by Jones when he entered and purchased; for there was no previous step which had in or of itself any efficacy whatever to confer a right in the lands or prevent him from acquiring them.

Substantially, the same comments may be made about the case of *McCreery* v. *Haskell*, 119 U. S. 327, 330, which

is also much relied on by the appellants. The dispute in that case was about certain public lands which, from the date of the grants, were *equally* open to selection by the State and by homesteaders and preëmptioners under an act of Congress relating to land titles in California. By its selection the State could acquire by the act of Congress a right or interest in the lands; by settlement, the preëmptioner could also acquire a right in them. That being the case, this court said: "The land lying outside of this survey thus became, in the language of the act, subject to the general land laws of the United States. It was open to settlement with other public lands, and consequent preëmption by settlers, and to selection by the State on behalf of the school sections within the confirmed Mexican grant. As between the settler and the State, the party which first commenced the proceedings required to obtain the title, if followed up to the final act of the government for its transfer, is considered as being entitled to the property. In such cases, the rule prevails that the first in time is the first in right."

In the present case the Railroad Company, as we have seen, acquired no interest whatever by merely requesting that it have certain indemnity lands to supply losses in place limits; whereas, in the California case, the prior act to which the subsequent act was referred—the selection by the State—would have given to the State a substantial interest in the lands, provided the lands had been open to selection by it at all. Proceeding on the basis that the selection was valid, the state court held that such selection was a prior substantial, effective act to which the subsequent act may be referred under the rule stated in former cases as to relation of time.

Further citation of authorities would seem to be unnecessary. In our opinion the filing by the Railroad Company of a list of lands, within indemnity limits, which it desired to obtain in order to supply deficiencies in place

limits, gave the company no interest in any particular lands, and Jones had the right under the homestead laws of the United States, *after* that list was on file, and before it was *approved by the Secretary*, to enter upon and occupy the indemnity lands so specified, with the intention to acquire them under the laws of the United States, and, by such entry and occupancy, with such intention, acquire a substantial interest or right in them which could not be affected or impaired by the subsequent approval of such list by the Secretary of the Interior; that the mere filing of the list did not and could not, in itself, be made the basis for any claim that would be inconsistent with Jones' legal rights as resulting from his entry and occupancy with the intention stated; consequently, the appellee claiming under Jones had the better right. To make the approval by the Secretary of the Interior relate back to a date when the Railroad Company confessedly did not have, and could not have acquired any, even an inchoate, interest in these lands, and thus cut off and destroy the intervening rights acquired by the homesteader before the Secretary's approval, would be to make a new and dangerous application of the doctrine of relation discussed at the bar. A subsequent act cannot properly be used to give legal effect to a prior act, as of a time when such prior act was performed, if the prior act had no efficacy whatever to confer an interest in the lands to which the two acts related. No adjudged case really holds to the contrary. These views do no injury to the Railroad Company, for if the homesteader is adjudged to have the better right, the company can, under the direction of the Secretary, go into the whole body of indemnity lands and pick out other lands to supply any loss in place limits; whereas, if the homesteader loses the land he has settled upon and occupied he will lose the benefit of his improvements, and must abandon the place he had fixed upon as his home.

One other matter should be referred to. Across the

certificate of purchase issued to Jones these words were written: "This receipt is issued under the order of the Secretary of the Interior, dated February 28th, 1898, subject to any claim the Northern Pacific Railroad Company may have to the lands herein described." Of course, the Secretary had no authority to do this, and his act had no legal efficacy. If the Railroad Company had rights superior to those acquired by Jones those rights could have been protected despite the certificate issued to Jones. If it had none, then the endorsement across the face of the certificate is to be regarded simply as a warning to Jones that he might have in the future a contest with the Railroad Company. The endorsement that Jones' purchase was subject to any claim the company "may have," neither added nor took away rights that belonged at the time to either the company or to Jones.

In our opinion the judgment of the Circuit Court of Appeals should be affirmed.

CAMPBELL *v.* WEYERHAEUSER.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 12. Argued April 27, 28, 1910.—Restored to docket for reargument December 19, 1910.—Reargued January 19, 20, 1911.—Decided February 20, 1911.

Decided on authority of *Weyerhaeuser* v. *Hoyt*, *ante*, p. 380.

THE facts are stated in the opinion.

Mr. Charles W. Bunn and *Mr. Frank B. Kellogg*, with whom *Mr. Stiles W. Burr* was on the brief, for appellants in No. 24 and appellees in No. 12.

Mr. Charles W. Bunn for plaintiffs in error in No. 181.

Mr. M. H. Stanford, with whom *Mr. H. H. Hoyt* was on the brief, for appellees in No. 24 and appellants in No. 12.

Mr. P. B. Gorman for defendant in error in No. 181.[1]

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This case and the *Hoyt case*, just decided, are of the same general character, and were consolidated and tried below as one case. In this case, however, the application of Campbell to purchase the tract by him claimed was rejected by the Land Department, and Campbell was not permitted to enter the land. The land furnishing the selection basis also lay further west in Minnesota than the lost tract in the *Hoyt case*. The Court of Appeals held that Campbell acquired no equitable interest in the land by his application, and the denial thereof, and consequently he could not maintain a bill in equity to charge the title under the patent issued to the railroad company upon a selection of a tract as lieu land, and affirmed the decree of the Circuit Court dismissing the bill. As in any event the decision rendered in the *Hoyt case* is decisive of this, we hold that the bill was rightly dismissed, and the decree of the Circuit Court of Appeals is therefore

Affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE DAY dissent for the reasons set forth in the dissenting opinion in case of *Weyerhaeuser* v. *Hoyt*, *ante*, p. 380.

[1] This case was argued simultaneously with No. 24, *Weyerhaeuser* v. *Hoyt*, *ante*, p. 380, and No. 181, *Northern Pacific Railway Company* v. *Wass*, *post*, p. 426.

NORTHERN PACIFIC RAILWAY COMPANY *v.* WASS.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 181. Argued April 27, 28, 1910.—Restored to docket for reargument December 19, 1910.—Reargued January 19, 20, 1911.—Decided February 20, 1911.

Decided on authority of *Weyerhaeuser* v. *Hoyt*, *ante*, p. 380.

THE facts are stated in the opinion.

Mr. Charles W. Bunn and *Mr. Frank B. Kellogg*, with whom *Mr. Stiles W. Burr* was on the brief, for appellants in No. 24 and appellees in No. 12.

Mr. Charles W. Bunn for plaintiffs in error in No. 181.

Mr. M. H. Stanford, with whom *Mr. H. H. Hoyt* was on the brief, for appellees in No. 24 and appellants in No. 12.

Mr. P. B. Gorman for defendant in error in No. 181.[1]

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

In brief, the facts of this case are as follows: While a filed selection by the St. Paul and Northern Pacific Railway Company of land within the indemnity limits of a railroad grant was awaiting the action of the Secretary of

[1] This case was argued simultaneously with No. 24, *Weyerhaeuser* v. *Hoyt*, *ante*, p. 380, and No. 12, *Campbell* v. *Weyerhaeuser*, *ante*, p. 324.

the Interior, Fred Wass, in April, 1899, entered upon the land with the intention of making it a homestead, and continued in possession, making improvements, etc. In December following Wass presented to the Land Office an application to enter the tract under the homestead laws. The register and receiver filed his application, but on the same day rejected it and refused to receive the fees tendered, basing such refusal and rejection upon the ground that the lands filed for were embraced in the then pending selection. On appeal the action of the local Land Office was affirmed by the Commissioner of the General Land Office and by the Secretary of the Interior respectively. The selection was subsequently approved and a patent for the lands was issued by the governor of Minnesota, all rights under which became vested in the Northern Pacific Railway Company, the plaintiff in error. That company then commenced this action against Wass and his wife in a court of the State of Minnesota to recover possession of the land and damages for the detention. In the answer, among other things, affirmative relief was prayed against the railway company for the conveyance of the legal title to Wass. A demurrer to the answer was overruled upon the authority of the decision in *Sjoli* v. *Dreschel*, 199 U. S. 564, and a decree was entered in favor of Wass, granting the relief prayed by him. This decree was affirmed by the Supreme Court of Minnesota upon the authority of the *Sjoli case* as well as the decision of the Circuit Court of Appeals in *Hoyt* v. *Weyerhaeuser*, 161 Fed. Rep. 324. The opinion just announced, reviewing the action of the Circuit Court of Appeals in the *Hoyt case* and reversing the decree entered in that case, conclusively establishes that error was committed by the court below, and therefore requires a reversal.

The judgment of the Supreme Court of Minnesota is therefore reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE DAY, dissenting.

This action was instituted in the District Court of Todd County, Minnesota, by the Northern Pacific Railway Company, a Wisconsin corporation, to recover the possession and damages for the detention of the southeast quarter of section thirteen, township one hundred and twenty-nine, north of range thirty-two west, situated in the above county.

The answer of the defendant Wass states certain facts both by way of defense and as the basis for an affirmative decree against the Railway Company, declaring that the legal title to the land is held in trust for his use and benefit, and should be conveyed to him. The company demurred to the answer as not stating facts sufficient to constitute either a defense or a counterclaim. The demurrer was overruled, and the case was determined on the facts stated in the answer, as well as on those set forth in a special finding. By the decree it was adjudged that the legal title was held in trust for the defendant, and the plaintiff was ordered to convey the title to him by sufficient deed. On the authority of *Sjoli* v. *Dreschel*, 199 U. S. 564, and *Hoyt* v. *Weyerhaeuser*, 116 N. W. Rep. 937 (104 Minnesota, 411), the Supreme Court of Minnesota affirmed the decree. The case is here for review.

Upon the record before us the following facts must be taken as beyond question:

1. The lands in question were surveyed public lands of the United States within the twenty mile indemnity limits of what are known as the Northern Pacific Railroad land grants made by Congress to the Territory of Minnesota by the act of March 3d, 1857, c. 99, 11 Stat. 195, and by the act of March 3d, 1865, c. 105, 13 Stat. 526, granting lands to that State, which last act was amended March 3d, 1871, 16 Stat. 588, c. 144.

2. By an act of March 1st, 1877, the legislature of Minnesota transferred all its rights in these lands to the Western Railway Company of that State. That company subsequently assigned its rights to the St. Paul and Northern Pacific Railway Company, the predecessor in interest of the present plaintiff.

3. On the thirty-first day of December 1877, the Western Railway Company filed in the proper Land Office a list purporting to contain a selection of lands under the indemnity provisions of the grants in question; not however designating any particular lands within the primary or place limits of either grant as the basis for the selected tracts. But the lands here in question were among those embraced in the above general list of selections.

4. *Nearly twelve years after the filing of the list of selections* by the Western Railway Company, namely, on December 4th, 1889, the St. Paul and Northern Pacific Railway Company filed in the local Land Office an amended list of the selection of indemnity lands, which list included the land now in dispute. And on February 12th, 1892 it filed a rearranged list of indemnity selections, and, then, for the first time, indicated the tract alleged to have been lost in primary limits, which loss it requested to be supplied by a particular tract in indemnity limits. Up to that time the Secretary of the Interior had not acted on that request nor approved any of the selection lists filed.

5. The fact may be here stated, though it is not very important, that the lands above described are also within the indemnity limits of the Northern Pacific grant made by the act of July 2d, 1864, c. 217, 13 Stat. 365, and were included in a withdrawal of indemnity lands made by the Secretary of the Interior on December 26th, 1871. But that withdrawal was revoked by the General Land Office, September 6th, 1887, and no final or approved selection of any of the described tracts was ever made under the provisions of the Northern Pacific grant.

6. In April 1899—the Secretary of the Interior not having, even at that date, approved either the original, amended or rearranged selections of indemnity lands, as shown on the company's lists theretofore filed—Wass "entered upon and took possession of and made a settlement" on the lands in question, and *thereafter maintained such possession and use of the lands as a homestead, residing continuously upon, cultivating and using them as his only home.* He also put improvements on them of the reasonable value of $1,200. All this he did with the *bona fide* intention of entering the lands under the homestead laws. The lands in their improved state exceeded $2,500 in value. Wass was qualified in all respects to become a claimant under the homestead laws of the United States. No question was made at the hearing below either as to his qualifications as a homestead claimant or as to the sufficiency of his residence on the land or of the value of his improvements.

7. On the fourth of December 1899, Wass filed with the Register and Receiver of the local Land Office an application—which was in due and legal form, and was accompanied by proofs of his qualifications and acts as a homestead claimant—to enter the said lands under the homestead laws, and tendered to the Receiver the fees and commissions lawfully chargeable upon his application. The Register and Receiver who received and filed the application rejected it, refusing to take the fees and commissions tendered "upon the sole ground that the lands applied for were embraced in a then *pending though unapproved* indemnity selection of the St. Paul and Northern Pacific Railway." This action was approved by the Commissioner of the General Land Office on the tenth of July 1903, on the ground that defendant's application "conflicted with the prior indemnity selection of the land made by the St. Paul and Northern Pacific Railway Company." The selection here referred to was manifestly the amended or

the rearranged list of indemnity selections filed by that company on December 4, 1889. Subsequently, on January 9, 1904, the Secretary of the Interior affirmed the decision of the Commissioner of the General Land Office, "on the ground that the indemnity selection of said lands by the St. Paul and Northern Pacific Railway and its predecessor, the Western Railway Company of Minnesota, were valid and of record prior to the date of the alleged settlement and filing of homestead application" by the defendant Wass. But he made no reference to the entry and settlement of Wass on the land under the homestead laws, *prior to the approval* of the list of selections *by the Secretary of the Interior.*

8. On the sixteenth of February, 1905—*nearly six years after Wass entered and settled upon and improved these lands as his home*—the Secretary of the Interior, for the first time, approved the list of indemnity selections made by the St. Paul and Northern Pacific Railway Company.

9. On the fifteenth of March, 1905, a patent was issued by the United States to the State for the use and benefit of the Railway Company, the lands being described as indemnity lands under the above grants of March 3, 1857, March 3, 1865, and March 3, 1871.

These undisputed facts present a question of law which the court may rightfully consider and determine. The doctrine is settled that facts, authoritatively found by the Land Department in the course of its administration of the public domain, cannot be collaterally questioned. But yet when the legal title to lands has passed from the United States to one party, when in equity and good conscience, according to the facts conceded, found or established, and when, as a matter of *law*, in view of those facts, it ought to have gone to another, the former may be adjudged to hold the title in trust for the latter, true owner, and compelled to convey to him. *Stark* v. *Starrs*, 6 Wall. 402, 419; *Johnson* v. *Towsley*, 13 Wall. 72; *Moore* v. *Rob-*

bins, 96 U. S. 530; *Rector* v. *Gibbon*, 111 U. S. 291; *Bernier* v. *Bernier*, 147 U. S. 242, 247; *In re Emblen*, 161 U. S. 52; *Hedrick* v. *A., T. & S. F. R. Co.*, 167 U. S. 673.

The contention is that under the patent issued by the United States to the State for the use and benefit of the Railway Company all the original rights of the State passed to the Northern Pacific Railway Company; whereas, the defendant claims that the Land Offices and the Secretary of the Interior illegally interfered with his purpose to perfect his lawful claim originating under the homestead laws of the United States, the right to do which, he insists, belonged to him under the provisions of § 2289 and other sections of the Revised Statutes, as amended by the acts of Congress.

Upon the undisputed facts, we hold that Wass' entry and settlement upon these lands, and his application for them, with the *bona fide* intention to complete his title under the homestead laws, all occurring before the Secretary's approval of the company's list, gave him an interest and right in the particular lands in question which could not be impaired or defeated by the *subsequent* approval of the Secretary of the Interior of the list of selected lands filed by the beneficiary of the land grant, although such list was filed prior to Wass' entry, settlement and application. The pendency of the list in the Land Office was not decisive, for the reason that it had not been approved by the Secretary at the time Wass' claim was made and *attached to* the lands. The lands in question, being within indemnity limits, were open to entry, settlement and acquisition by qualified claimants under the homestead laws, after and notwithstanding the mere filing of the list of selected lands; and the rights acquired by the homesteader in the manner stated were not impaired or overridden by the Secretary's subsequent approval of such list.

For the reasons stated in the dissenting opinion in

Weyerhaeuser v. *Hoyt*, just decided, the judgment should be affirmed. We dissent from the opinion and judgment of the majority.